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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 32098

GUSTAFUS V. IVERSEN, EDWARD WIDMAYER, P. J. CANCELMO, PERCY S. COOKE, F. H. VAHLSING, HARRY J. PRICE, AND THE NATIONAL LEAGUE OF WHOLESALE FRESH FRUIT AND VEGETABLE DISTRIBUTORS, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

STATEMENT OF JURISDICTION

Jurisdictional Statement by Petitioners Under Rule 12 of the Revised Rules of the Supreme Court of the United States

The petitioners-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C. Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 41 (28) (Act of June 18, 1910, c. 231, sec. 207, 36 Stat. 1148; as amended October 22, 1913, c. 32, 38 Stat. 219).

U. S. C. Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 928).

U. S. C. Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 345 (4) (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191 sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statute or Treaty of the United States, the Validity of Which Is Involved

The validity of Section 1(15) of the Interstate Commerce Act, 49 U. S. C. Sec. 115 (Act of May 29, 1917, c. 23, 40 Stat. 102, as amended by the Transportation Act of February 28, 1920, c. 91 sec. 402, 41 Stat. 476-477), is involved in that the interpretation of said Section 1 (15), upon which the orders of the Interstate Commerce Commission here involved depend, and which interpretation and order the District Court upheld, if sustained by the Supreme Court would appear to require the Court to determine that said Section 1 (15) violates the due process clause of the Constitution. Said Section 1 (15) provides as follows:

> "Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the inter-

ested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

C. Date of the Judgment or Decree Sought to be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered January 15, 1946. The Petition for Appeal was presented and allowed on January 23, 1946, together with the Assignment of Errors.

D. Nature of Case and of Rulings Below

On December 15, 1945, the petitioners filed in the Court below their petition praying that the Court set aside and enjoin the operation of certain orders of the Interstate Commerce Commission, being Third Revised Service Order No. 180 issued May 24, 1945, as amended November 26, 1945; Fourth Revised Service Order No. 180 issued December 7, 1945; Service Order No. 394 issued December 7, 1945, as amended December 13, 1945; and Service Order No. 396 issued December 10, 1945. Each of these orders, except Service Order No. 396, increased the demurrage charges on carload shipments of perishables in refrigerator cars. Service Order No. 396 directed the railroads to supplement their tariffs by providing that carload shipments of perishables held more than two days, exclusive of Sundays and bank holidays, at any point prior to delivery to the ultimate destination and reforwarded upon request of the consignor, consignee, or owner, should be subject to the full local or joint rate from the primary point of origin to the reforwarding point, plus the full local or joint rate from the reforwarding point, in effect on the date of shipment from the point of origin. Each of these orders was made applicable to intrastate as well as to interstate commerce. Third Revised Service Order No. 180, as amended November 26, 1945, expires by its own terms on March 15, 1946. Fourth Revised Service Order No. 180, Service Order No. 396 expire by their own terms on February 15, 1946.

Each of these Service Orders was issued by the Commis-

sion upon its own initiative without complaint, at once, without answer or other formal pleading, and without notice, hearing, or the making or filing of a report.

The petitioners, and each of them, are engaged in the business of purchase and sale of fresh fruits and vegetables which are shipped in interstate commerce in refrigerator cars over the lines of the railroads operating in accordance with the provisions of the Interstate Commerce Act (U. S. C. Title 49, secs. 1 et seq.), and the rules and regulations of the Interstate Commerce Commission promulgated thereunder and pay all transportation charges on such shipments in accordance with the provisions in the tariffs of said railroads lawfully filed in accordance with said Act and rules and regulations.

The defendants assert the validity of these orders as within the authority of the Interstate Commerce Commission pursuant to Section 1 (15) of the Interstate Commerce Act (U. S. C. Title 49, sec. 115).

The District Court dismissed the petition except that, with respect to Fourth Revised Service Order No. 180 and Service Order No. 394, the operation of said orders was enjoined insofar as they provide for the inclusion in free unloading time of Sunday, Monday and Tuesday, December 23, 24, and 25, 1945, Sunday, December 30, 1945, and Tuesday, January 1, 1946.

The District Court concluded that the issuance of each of the Service Orders was within the emergency powers of the Commission granted it in Section 1 (15) of the Interstate Commerce Act. The Court failed to rule upon the issue raised by the petitioners that Section 1 (15) of the Interstate Commerce Act, if construed to authorize the Commission to order changes in demurrage charges without affording to interested persons an opportunity to be heard before the orders become operative, is a violation of the due process clause of the Constitution.

The scope of the emergency powers granted to the Commission under Section 1 (15) of the Interstate Commerce Act has not been fully adjudicated. It has been held that the Commission's emergency powers under that section are confined to the instances specifically enumerated therein. *Peoria and P. U. Ry. Co.* v. *United States*, 263 U. S. 528, 534-535, 44 Sup. Ct. 194, 196. In no instance has the Supreme Court ruled upon the authority of the Interstate Commerce Commission under Section 1 (15) to order changes in demurrage charges.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal

It is believed that the following cases sustain the Supreme Court's jurisdiction of this appeal:

Peoria and P. U. Ry. Co. v. *United States*, 263 U. S. 528, 534-535, 44 Sup. Ct. 194, 196;

United States v. *Ill. Central R. R. Co.*, 291 U. S. 457, 54 Sup. Ct. 471.

F. Opinion and Decree of the District Court

Appended to this statement are copies of (1) the opinion of the District Court dated January 8, 1946, and (2) the final decree of said Court sought to be reviewed dated January 15, 1946.

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

Dated this 25th day of January A. D. 1946.

HASKELL DONOHO,
DALE C. DILLON,
ASHLEY SELLERS,
111 Kellogg Building,
Washington, D. C.
Counsel for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 32098

GUSTAFUS V. IVERSEN, et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*

Before PRETTYMAN, Associate Justice, United States Court of Appeals, District of Columbia, and BAILEY and HOLTZOFF, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

PRETTYMAN, *J.*:

Plaintiffs bring this action praying that the court set aside and enjoin the execution of certain orders of the Interstate Commerce Commission, being Third Revised Service Order No. 180, Fourth Revised Service Order No. 180, Service Order No. 394, and Service Order No. 396. These orders directed changes in demurrage rules and charges on refrigerator cars. They recited that these cars are being delayed unduly while held for orders, loading and unloading, etc., thus impeding and diminishing the use, control, supply, movement, etc., of such cars, and that in the opinion of the Commission an emergency exists requiring immediate action to prevent a shortage of railroad equipment and congestion of traffic. Prior to the issuance of Revised Service Order No. 180 on October 2, 1944, the uniform demurrage practice was no charge for the first two days (excluding Sundays and legal holidays) during which a car was held for loading or unloading, which two days are known as "free time"; a charge of $2.20 per car per day for the first two days after expiration of the free time, and a charge of $5.50 per car per day for each day or fraction thereof thereafter. Revised Service Order No. 180 directed the railroads to supplement their tariffs so as to charge $11.00

per car per day for the fourth day after the expiration of free time, $22.00 per car per day for the fifth day, and $44.00 per car per day for the sixth and all successive days. Third Revised Service Order No. 180, issued May 24, 1945, did not alter that schedule. By Fourth Revised Service Order No. 180, entered December 7, 1945, the Commission ordered the railroads to supplement their tariffs by providing that Sundays and holidays be included in the computation of free time for demurrage purposes; that a charge of $11.00 per car per day be made for the first day after the expiration of free time, $22.00 per car per day for the second day, and $44.00 per car per day for the third and all successive days. By Service Order No. 394, entered December 7, 1945, the Commission ordered the railroads to supplement their tariffs with a general provision that all Sundays and legal holidays be included in computing free time on refrigerator cars. By Service Order No. 396, the Commission directed the railroads to supplement their tariffs by providing that carload shipments of perishables held more than two days, exclusive of Sundays and bank holidays, at any point prior to delivery at the ultimate destination and reforwarded upon request of the consignor, consignee or owner, should be subject to the full local or joint rate to the reforwarding point, plus the tariff rate from the reforwarding point in effect from the point of origin. These orders were made applicable to intrastate as well as to interstate commerce. Third Revised Service Order No. 180 expired by its own terms December 1, 1945, and the prayer for its injunction is, therefore, moot. Fourth Revised Service Order No. 180, Service Order No. 394 and Service Order No. 396 expire by their own terms on February 15, 1946.

Defendants filed motions to dismiss. Both plaintiffs and defendants filed motions for summary judgment.

These service orders of the Commission were issued without hearing. Plaintiffs contend that the Commission was without power to issue such orders without hearing.

The existence of the emergency is not denied and the reasonableness of the charges established by the orders is not

challenged in this proceeding. The question presented concerns the statutory power of the Commission.

The emergency powers of the Commission which permit it to issue certain orders without hearing, are conferred by Section 1(15) of the Interstate Commerce Act (49 U. S. C. A. § 1(15)). This section of the statute authorizes the Commission, whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency exists, to suspend, with or without notice or hearing, the operation of "rules, regulations or practices then established with respect to car service" and to make such just and reasonable "directions with respect to car service" during the emergency as in its opinion will best promote the service in the interests of the public and the commerce of the people. Car service is defined by Section 1(10) of the Act to include the use, control, supply, movement and distribution of cars.

The question in the case at bar is whether the computation of "free time" and the scale of demurrage charges are rules [1] with respect to the use, supply or movement of cars. If so, the orders of the Commission, involved in this action, were within its emergency powers; if not, they are invalid because issued without hearing.

Demurrage was originally a maritime term. The right of a railroad to make a demurrage charge was originally challenged as beyond its power except by contract. The right was sustained by the courts upon the ground that a common carrier has the right to adopt and enforce any reasonable regulation for the conduct of its business, where the purpose and effect are the protection of the carrier and the

---

[1] The Supreme Court thus epitomized Section 1(15), "Section 15 gives the Commission, when shortage of equipment, congestion of traffic or other emergency requires action in any section of the country, authority to suspend its rules as to car service, and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people, and to give direction for performance or priority in transportation or movement of traffic." United States v. Koenig Coal Co., 270 U. S. 512, 515. The Court thus clearly indicated that "rules, regulations and practices" in clause (a) and "directions" in clause (b) mean simply "rules" in its view.

benefit of the public.[2] As early as 1891, the Railroad Commissioners of Kansas issued a circular to the general managers of the railroads in Kansas, saying:

> "In view of the present flattering prospect for abundant crops of farm produce in Kansas, and as a means to avoid the possibility of a shortage in transportation facilities, the commission desires to respectfully impress upon you the importance of a thorough and uniform system for the apportionment and distribution of cars among the several stations and shippers along the line of your road. As a means to this end we beg leave to submit the following suggestions, and ask if they meet with your approval, that instructions be issued to your agents accordingly, viz.:
>
> • • • • • • •
>
> "Seventh:—A demurrage charge should be rigidly collected when cars are held an unreasonable time for loading.[3]

In 1894 the Virginia Supreme Court of Appeals considered the validity of a demurrage charge in view of a state statute which forbade a railroad to charge any fee or commission "other than the regular transportation fees, storage, and other charges authorized by law." The official report of the matter says:

> "The company had made a rule, of which plaintiffs had notice, that a charge of $1 per car per day would be made for every detention of a car for the purpose of loading or unloading beyond seventy-two hours from the time that the car was placed at the disposal of the shipper or consignee, as the case might be."

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[2] Miller & Co. v. Georgia Railroad & Banking Co., 88 Ga. 563, 18 L. R. A. 323 (1891); Norfolk & W. R. Co. v. Adams, Clement & Co., 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530 (1894).

[3] Kansas Railroad Commissioners' Report 1891, p. 22, quoted in 22 L. R. A., footnote on p. 532.

The court said:

> "It [the demurrage charge] is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed."

The court sustained the charge on the ground that after allowance of a reasonable time for unloading, the railroad "can make reasonable rules and regulations and charges for (such) service as bailee, as it may see fit," and said, "Such charges are not carrier charges in the meaning, intendment or prescription of the statute."[4]

Thus, the original support for the right of a railroad to impose a demurrage charge was that such charge constituted a reasonable rule and regulation in respect to the use of the car, the purpose being to prevent delay in loading and unloading.

The Interstate Commerce Commission early referred to demurrage charges as car-service rules. For example, in *Cudahy Packing Co.* v. *Chic. & Northwestern Ry. Co.*, 12 I. C. C. 446 (1907), it said, "The car-service rules of the defendant provide for a demurrage charge of $1 per day if cars are not unloaded within forty-eight hours," and repeatedly used the expression "car-service rules" throughout that report.[5]

The demurrage charges of the railroads and the enactments by the several states in respect to them were so conflicting that in 1908 the National Association of Railway Commissions appointed a committee which drafted a Uniform Demurrage Code, which was approved by the Interstate Commerce Commission in December, 1909. The recited primary purposes of this Code were to promote the prompt release of cars and to prevent unreasonable detention of equipment. While this Code has been amended from time to time, it is still in effect, the latest general publication being December 28, 1944. As now published, it is entitled "Freight Tariff No. 4-Y, Naming Car Demurrage

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[4] Norfolk & W. R. Co. v. Adams, Clement & Co., *supra* note 2.

[5] *See* Investigation and Suspension Dockets 83 and 83-A, 25 I. C. C. 314 (1912).

Rules and Charges—Storage Rules and Charges." Section 1 of this publication contains "Demurrage Rules and Charges" and covers many subjects under that heading. Rule No. 1 specifies the cars subject to the rules; Rule No. 2 describes the free time allowed; Rule No. 3 prescribes the method for computing time; Rule No. 4 provides for notification of arrival of cars; Rule No. 5 prescribes the placing of cars for unloading; Rule No. 6 prescribes the placing of cars for loading; Rule No. 7 prescribes the demurrage charges; Rule No. 8 prescribes the method of refunds for certain causes, and Rule No. 9 provides for average agreements. Thus, demurrage charges are an integral part of the demurrage rules as published and used in the industry. Orders of the Commission relating to demurrage have always been entitled "service orders" and, when issued, are, by direction of the Commission, served upon the Car Service Division of the Association of American Railroads, as agent of the railroads subscribing to the car service and per diem agreement.

During World War I, when the country was faced with an emergency in freight car service, the Director General of Railroads directed the publication of demurrage charges at the rate of $3.00 for the first day and an increase of $1.00 per day for each succeeding day until a maximum of $10.00 per day was reached. This action was attacked on the ground that the increased charges were penalties and that the Director General had no power to impose penalties. The Commission sustained the Director General.[6] Later, the Director General established a demurrage charge on lumber of $10.00 per car per day on cars held for reconsignment beyond forty-eight hours. The schedule stated that it was to prevent undue detention of equipment under the then present emergency. This charge was published in the uniform demurrage tariff. This action of the Director General was attacked, again on the ground that he had no authority to establish a penalty. The Commission said:

> "We are of opinion that the Director General was authorized to inaugurate any reasonable and just regu-

[6] Lowry Lumber Co. v. Director General, 58 I. C. C. 113.

lation and practice which he might find necessary to eliminate the abuse of excessive and unreasonable detention of freight cars.'"[7]

This action and decision was brought before the courts in *Turner, Dennis & Lowry Lumber Co.* v. *Chic., M. & St. P. Ry.*, 2 F. 2d 291, 271 U. S. 259. In the course of its opinion on the matter, the Supreme Court said:

"The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. [Citing cases.] One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.

"All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. [Citing cases.] The charge here in question, although called a penalty, is in essence an additional demurrage charge, increasing at a step rate. Such additional charges increasing with the length of the period of detention were introduced in respect to some cars by the National Car Demurrage Rules. See Rule 7.—Demurrage Charges, sections A and B. They were widely applied while the railroads were under federal control."

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[7] American Wholesale Lumber Asso. v. Director General, 66 I. C. C. 393, 396.

The Court further said:

> "The further contentions are that there was a denial of due process of law because the so-called penalty was imposed without notice; and that there was a denial of equal protection of the laws, because the charge was applicable only to cars loaded with lumber. The demurrage charge is, however, a tariff provision and not a penal law, and thus the tariff duly filed charges the shipper with the requisite notice. And neither the Constitution nor the rule of reason requires that either freight or demurrage charges or the reconsignment privilege shall be the same for all commodities. We find no reason to disturb the basis of the Commission's classification."

The Supreme Court has considered the nature of demurrage charges in *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, and in *Pennsylvania R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319. In the latter case, the Court remarked:

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate. The aim of the Code [the Uniform Demurrage Code] was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable."

From the foregoing it seems clear that demurrage charges are in part compensation and in part penalty; that in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are *sui generis*. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier

charges or as penalties. As an integral part of the rules and regulations in respect to car service, they fall within the provisions of Section 1(15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges.

Appellants argue that demurrage charges are "rates, fares, and charges for transportation" and that the term "rules, regulations, or practices" has no relation to the fixing of rates, fares or charges. They cite *Lehigh Valley R. Co.* v. *U. S.*, 188 F. 879 (C. C. A. 3d, 1911). That case holds that demurrage charges must be filed with the Commission and, when filed, must be observed as filed. But the section of the statute there relied on (Section 6 of the act of 1887, as amended) requires that the filed schedules shall include "all other charges which the Commission may require," and "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges." It seems to us that the argument of plaintiffs in this respect is a *non sequitur*, and, further, that the case cited does not support the point made. If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation.

The further point is made by the plaintiffs that these orders of the Commission are invalid because thirty days notice was not given to the Price Administrator, as the designated agency of the President under the provisions of Section 1 of the Stabilization Act of 1942.[8] That statute provides in part:

> "That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

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[8] Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. A. § 961.

Although the Price Administrator, on his own behalf and on behalf of the Stabilization Director, originally petitioned to intervene as a party plaintiff in this case, he later withdrew his petition, stating, "Conversely, if this court should hold that the Commission may direct an increase in a demurrage charge without following the usual procedure provided for increases of rates or charges, the notice provision of the Stabilization Act would not be applicable." This obviously must be so, because if the Commission directs an increase in demurrage charges without notice and without hearing, the carriers, being without notice themselves, could not give the Price Administrator notice, and, there being no hearing, there would be no proceeding in which intervention could be had. The statute could not be held to direct an impossible act. Morever, it would require clear language in the statute to persuade us that Congress intended to nullify an existing emergency power granted the Commission solely in the public interest and effective only for limited times of public necessity.

In argument plaintiffs contend that the service orders here involved are invalid because made applicable to intrastate as well as to interstate commerce. The complaint contains no averment as to intrastate traffic, but, on the contrary, the averments are that plaintiffs, including the intervening plaintiff, and their members are engaged in interstate and foreign commerce, and in business over the lines of railroads operating in accordance with the provisions of the Interstate Commerce Act. We need not, therefore, consider the point.

Plaintiffs averred that it would have been impossible to unload cars on certain days during the Christmas holidays. The labor situation in that respect was of such common knowledge that we took judicial notice of it in passing upon the application for a temporary restraining order. In passing upon the motions to dismiss and the cross motions for summary judgment, the averments of the complaint must be accepted as facts. Upon that premise it appears that the orders could not, in respect to those days, accomplish any part of their sole objective, i. e., the unloading of cars. Their only result, so far as those days are concerned,

would be to cause payments to be made to the railroads by shippers. We think that emergency orders with that sole result are arbitrary. We, therefore, sustain as part of the judgment upon the motions for summary judgment the provisions of the temporary restraining order. So much of the orders of the Commission as provide for the exclusion from free time of Sunday, Monday, and Tuesday, December 23, 24, and 25, 1945, Sunday, December 30, 1945, and Tuesday, January 1, 1946, will be set aside and enjoined.

Orders will be drawn in accordance with the foregoing opinion.

E. Barrett Prettyman,
Jennings Bailey,
Alexander Holtzoff.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

Civil Action, No. 32098

Gustapus V. Iversen, et al., *Plaintiffs*,

vs.

United States of America and Interstate Commerce Commission, *Defendants*.

Final Decree

This cause having come on for final hearing by the special court of three judges, constituted as required by the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47), and the Court, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined for the reasons set forth in its opinion herein filed January 8, 1946, that Fourth Revised Service Order No. 180 and Service Orders Nos. 394 and 396 of the Interstate Commerce Commission are within the power of the Commission and are valid in all respects except

to the extent specified in the said opinion, and that the relief prayed for by the petition should be denied except to the extent granted by the temporary restraining order issued by this Court on December 21, 1945; it is therefore,

Ordered, Adjudged and Decreed, That the prayers of the petition that Revised Service Order No. 180, amendments thereto and revisions thereof, Service Order No. 394 and Service Order No. 396 of the Interstate Commerce Commission be set aside and annulled and their enforcement enjoined, be, and they are hereby, denied, and the petition be, and it is hereby, dismissed, at plaintiffs' costs, except that so much of said service orders as provide for the inclusion in the computation of free time of Sunday, Monday and Tuesday, December 23, 24 and 25, 1945, Sunday, December 30, 1945, and Tuesday, January 1, 1946, be, and it is hereby, set aside and enjoined.

This 15th day of January, 1946.

E. Barrett Prettyman,
United States Circuit Judge.
Jennings Bailey,
United States District Judge.
Alexander Holtzoff,
United States District Judge.

Approved as to form:
Haskell Donoho,
Ashley Sellers,
Dale C. Dillon,
Attorneys for plaintiffs.

K. P. Casey,
Attorney for intervening plaintiff,
International Apple Association.

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FILED
MAR 6 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 917

GUSTAFUS V. IVERSEN, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

HASKELL DONOHO,
DALE C. DILLON,
ASHLEY SELLERS,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 917

GUSTAFUS V. IVERSEN, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

Appellees' motion to affirm, though concluding with the familiar phrase "no substantial question", is in reality a brief on the merits of the question presented on this appeal. Tempting as is the opportunity seemingly afforded them to reply in kind, appellants will address themselves to the substantiality [1] rather than to the merits of the question presented.

[1] Summarily stated, in the light of the decisions of this Court on the issue of the existence of a substantial question, the proper inquiry "is not whether the question relied upon will be found, upon an examination of the merits, to be unsound". *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36, 30 S. Ct. 676, 679. It turns rather upon whether the claim has at least "color" of merit, *New Orleans Water Works* v. *Louisiana*, 185 U. S.

Tersely stated, the question here presented is whether the Interstate Commerce Commission on its own initiative may issue, without affording to interested persons an opportunity to be heard in any manner before such orders become effective, orders temporarily—

1. reducing the free time, as provided in lawfully published tariffs of common carriers by railroad, for the loading and unloading of carload shipments of perishables in refrigerator cars;

2. increasing the demurrage charges,[2] also provided in such tariffs, for the use of refrigerator cars pending loading or unloading thereof; and

3. changing the measure of the through rates, likewise provided in such tariffs, applicable on carload shipments of perishables in refrigerator cars held at points intermediate between the primary origin and ultimate destination for diversion or reconsignment.

Appellants contend that such orders change or determine and prescribe "rates, fares, or charges" within the meaning of Section 6, paragraph 3, and Section 15, *inter alia*, of the

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336, 22 S. Ct. 291; is "manifestly lacking all color of merit", *Wabash Railroad Co.* v. *Alexander Flannigan*, 192 U. S. 29, 24 S. Ct. 224, 226; is "so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous", *Seaboard Air Line Railway* v. *Clara V. Padgett*, 236 U. S. 668, 35 S. Ct. 481, 482; is "utterly without merit", *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway Co.*, 228 U. S. 596, 33 S. Ct. 605, 606-607; or is "more formal than substantial", *Equitable Life Assurance Soc.* v. *Brown*, 187 U. S. 308, 314, 28 S. Ct. 80. The question presented has been held to be substantial where "analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions" upon the issue currently presented, *Louisville & N. R. Co.* v. *Melton, supra;* or where the question "has not been the subject of express consideration" in prior decisions of the Court and hence "cannot be said to have been so explicitly foreclosed to cause the contention on the subject to be obviously frivolous", *Griffith* v. *Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 134; *Louisville & N. R. Co.* v. *Melton, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway Co., supra.*

Interstate Commerce Act, and that the Commission has been empowered to make and enter such orders only in accordance with the notice or hearing procedure specified in those sections of the statute. Appellees contend that such orders suspend "rules, regulations, and practices • • • with respect to car service" and make "directions with respect to car service" within the meaning of Section 1 paragraph 15, of the Act, and that the summary manner in which such orders were promulgated and put into effect is countenanced by that and no other statutory provision. Respecting Section 1, paragraph 15, appellants assert (1) that that provision neither expressly nor by implication empowers the Commission to determine or prescribe or to change demurrage or other transportation rates or charges, and (2) that, if Section 1, paragraph 15, is to be construed to so empower the Commission, it is unconstitutional in that it authorizes an administrative agency to fix rates or

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[2] A quick grasp of the drastic increases in the charges which shippers and receivers of perishables are required to pay to the railroads as a result of the Commission's orders may be obtained from the following comparative table:

Normal Charges Established by Railroads	*Charges Required by Fourth Revised Service Order 180 and Service Order 394*
Cars unloaded within 48 hours, exclusive of Sundays and bank holidays, after the first seven A. M. (7:00 A. M.) following arrival of the car at destination—no charge.	Cars unloading within 48 hours, including Sundays and holidays, after the first seven A. M. (7 A. M.) following arrival of the car at destination—no charge.
For the first two days or fraction of a day that a car is held after expiration of the free time—$2.00 per car per day.	For the first day after the expiration of the free time—$11.00 per car per day.
For the third day and each day or fraction of a day thereafter, after the expiration of the free time—$5.50 per car per day.	For the second day after the expiration of the free time—$22.00 per car per day.
	For the third day and all successive days or fraction thereof after the expiration of the free time—$44.00 per car per day.

charges without affording interested persons an opportunity to be heard before the rate-order becomes effective.

Each of appellants' alternative contentions, the one statutory and the other constitutional, presents a substantial question.

I

The Scope of the Commission's Emergency Powers under Section 1, Paragraph 15, Is Uncertain

Paragraphs 10-17, inclusive, of Section 1 of the Interstate Commerce Act has their origin in the so-called Esch Car Service Act of May 29, 1917, c. 23, 40 Stat. 101. Undoubtedly, those provisions were intended to confer broad powers upon and to facilitate flexible action by the Commission in the field of "car service". The boundaries of that field, although dim, are neither limitless nor undiscoverable. This Court had no difficulty in finding the Commission was inside those boundaries in *Avent* v. *U. S.*, 265 U. S. 172; or in finding that the Commission had strayed beyond them in *Peoria & P. Union R. Co.* v. *U. S.*, 263 U. S. 528. In the latter case, the Court set aside a Commission order, issued under the purported authority of Section 1, paragraph 15, which directed one carrier to perform switching services for another. The Court said, at pp. 534-535:

> The Transportation Act of 1930 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end, and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication.

For at least twenty-five years after it received the emergency authority under Section 1, paragraph 15, the Commission did not even undertake to exercise it in connection

with the rates or charges to be paid by shippers or other members of the public enjoying railroad services. The motion to affirm recites appellees' version of the legislative history of Section 1, paragraph 15, and the other so-called "car service provisions" of the Act. Appellants, if permitted to submit brief and argument before this Court, will show that the legislative history demonstrably refutes any contention that these provisions were intended to countenance any such rate making or charge fixing activities.

Even at this late date, appellees admit they have not staked out the boundaries of the Commission's powers under Section 1, paragraph 15. Counsel for the Commission frankly stated in the course of argument in the court below:

> "• • • the full power of the Commission under these emergency provisions has never been defined, and I don't know whether it includes a line-haul rate or not" (Tr. p. 65).

The Commission's position in this case is that, whatever the authority of the Commission under paragraph 15 of Section 1 to change or prescribe line-haul rates, the Commission may fix or change demurrage charges on the theory that the latter are not altogether charges for transportation services but are, at least in part, penalties assessed against shippers or receivers for undue detention of cars. The court below, agreeing with the Commission's contention, glossed over the effect of Service Order No. 396 which, whatever the soundness of a claimed differentiation in kind between demurrage rates or charges and line-haul rates, definitely pertains to the latter.

The necessary effect of the judgment of the court below, if this Court should conclude that "no substantial question" is raised in this appeal, will be to subject to doubt and uncertainty the entire procedural structure of the Interstate Commerce Act. The court below evidently deemed it was

avoiding any such result by singling out for comment the Service Orders dealing exclusively with demurrage charges and passing lightly over the type of rates or charges—aggregate local versus through rates—affected by Service Order No. 396 and, further, by concluding that demurrage charges are not "rates as that term is used in connection with rate-making". Admittedly, demurrage charges have a somewhat different purpose than some of the other types of "rates, fares, or charges" comprehended by the Interstate Commerce Act, but, at least until publication of the opinion of the court below, it appeared to be well established that demurrage charges are "rates, fares, or charges" within the meaning of the Act and could be determined and prescribed by the Commission only in accordance with the hearing procedure specified by the Act to accompany the determination and prescription of "rates, fares, or charges" generally.

Indeed, this conclusion of the court below, to which, *inter alia*, appellants' assignment of errors is directed, presents a "substantial question" in and of itself. While it may appear to have a subsidiary aspect herein in that the determination of this question is a principal starting-point toward the determination of the scope of Section 1, paragraph 15, it has an independent and substantial significance of its own. The opinion of the lower court in this connection is squarely at variance with the conclusions reached in *Turner, Dennis & Lowry Lumber Company* v. *Chicago M. & St. P. Ry. Co.*, 271 U. S. 259, 262, 46 S. Ct. 530, 531; *Lehigh Valley R. Co.* v. *U. S.* (Pa. 1911), 188 F. 879, 110 C. C. A. 513 (affirming [D. C. 1910] 184 F. 543), and cases cited therein.

II

The Constitutionality of the Summary Procedure Contemplated in Section 1, Paragraph 15, of the Interstate Commerce Act Has Not Been Adjudicated.

Appellants urge that, if Section 1, paragraph 15, empowers the Commission to order increases in rates or charges without affording opportunity for hearing before the increases become effective, that provision of the Act violates the Due Process Clause. Appellants' contention was alleged in its petition for injunction and was vigorously pressed upon the court below. Unaccountably, under these circumstances, the court below ignored the entire question; its opinion does not even mention the point.

This question, we submit, is basic. In term after term of this Court it has received the Court's attention in one form or another, and in no instance has this Court ruled that an administrative agency may be empowered to fix rates or charges without affording interested persons an opportunity to be heard before the rates or charges become effective. At least three times during the last ten years and once within the last year, this Court has expressed itself as follows:

> The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final order becomes effective.* (Emphasis supplied.) *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152, 153, 61 S. Ct. 524, 536, 85 L. Ed. 624; *United States* v. *Ill. Central R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 473; *Inland Empire Dist. Council, Etc.* v. *Millis*, 325 U. S. 697, 710, 65 S. Ct. 1316, 1323, decided June 11, 1945.

Appellants are mindful that, in *Bowles* v. *Willingham*, 321 U. S. 503, 519, 521, 64 S. Ct. 641, 649, 650, this Court

held that the Administrator of the Office of Price Administration under a wartime statute could fix rents without the necessity of hearing at the administrative level. It might be argued that the rationale of this decision is, to some extent, inconsistent with that of the cases previously cited. It is only necessary to say that, if there be this inconsistency, it serves here only to demonstrate the substantiality of the question now presented.[3] On the other hand, if the excerpt quoted above from the *Opp Cotton Mills* case is still the law of this Court as far as rate making procedure is concerned, the judgment of the court below becomes even more imperatively the concern of this Court.

The court below, in completely ignoring the constitutional issue in the case, undoubtedly makes more difficult the appellants' task in securing the ear of this Court on that issue. Appellees have seized on this temporary advantage and, in their motion to affirm, endeavor further to distract this Court's attention by the following single-sentence reference to the question:

> Other points urged by appellants require no consideration. The allegations of unconstitutionality advanced by appellants amount merely to a restatement in different form of their claim that the Commission acted without statutory authority. *Baltimore & Ohio Railroad Co.* v. *United States*, 305 U. S. 507, 526.

An examination of this sole decision cited by appellees serves only to corroborate the shallowness of appellees' effort to avoid judicial scrutiny of the constitutional question presented here. In the *Baltimore & Ohio Case*, it was claimed that a cease-and-desist order of the Commission was a violation of substantive due process. The reasonableness of the order was the sole question involved. No procedural rights were even alleged to have been invaded.

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[3] Note 1, *supra*, p. 1.

In the case at hand, the reasonableness of the Commission's orders is not in issue; the matter here presented is the power of Congress to sanction the issuance of any order at all in the manner in which the orders were issued. The lack of analogy of a case dealing with substantive power to the problem of procedural due process here presented is apparent.

Respectfully submitted,

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March 6, 1946.

(3343)

In the District Court of the United States for the District of Columbia

CIVIL No. 32098

GUSTAFUS V. IVERSEN ET AL., PLAINTIFFS-APPELLANTS.

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS-APPELLEES.

Filed Feb. 13, 1946. Charles E. Stewart, *Clerk.*

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered January 15, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' com-

[1] An opinion, by Circuit Judge Prettyman, was also filed on January 8, 1946.

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plaint[2] to set aside certain orders of the Interstate Commerce Commission.

The Commission's orders[3] find and declare "that there is a critical shortage of refrigerator cars and that free time published in tariffs for loading and unloading such cars aggravates the shortage thereof"; that "carload shipments of perishables are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars"; that "refrigerator cars are

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[2] The decree dismissed the complaint and denied the relief prayed for by appellants, except to the extent that temporary relief had been granted by a restraining order issued on December 21, 1945. That exception is not involved in the present appeal.

[3] The complaint attacked Revised Service Order No. 180, dated October 2, 1944, and amendments thereto and revisions thereof, particularly Fourth Revised Service Order No. 180, dated December 7, 1945, effective December 15, 1945, superseding previous revisions and by its terms expiring on February 15, 1946; Service Order No. 394, dated December 7, 1945, effective December 15, 1945, and expiring by its terms on February 15, 1946; Service Order No. 396, dated December 10, 1945, effective December 15, 1945, and expiring by its terms on February 15, 1946. Though not elsewhere mentioned in the complaint, the prayer for relief sought also to enjoin Third Revised Service Order No. 180, dated May 24, 1945. As this order expired by its own terms on December 1, 1945, prior to the filing of the complaint on December 15, 1945, the District Court held that the prayer to enjoin that order was moot. Revised Service Order No. 180, Service Order No. 394, and Service Order No. 396 were amended on February 11, 1946, so that they will not expire until April 15, 1946.

being delayed unduly while held for orders, bills of lading, payment of freight charges, reconsignment, diversion, reshipment, inspection, forwarding directions, loading and unloading, thus impeding and diminishing the use, control, supply, movement, distribution, exchange, interchange, and return of such cars"; that "in the opinion of the Commission an emergency exists requiring immediate action to alleviate the refrigerator car shortage in all sections of the country," and that "an emergency exists in all sections of this country requiring immediate action to prevent a shortage of equipment and congestion of traffic."

Issued for temporary application only, under the emergency provisions of Section 1 (15) of the Interstate Commerce Act, these orders were made upon the Commission's own initiative without complaint, without answer or other formal pleading by the interested carriers and without notice, hearing, or the filing of a report. They directed temporary changes in demurrage rules and charges on refrigerator cars, and provided that the privilege of reconsignment or diversion, as authorized by existing tariffs, should temporarily not be accorded unless promptly availed of.[4]

[4] The effect of Fourth Revised Service Order 180 is to increase the demurrage charges on refrigerator cars to $11 per car per day for the first day after the expiration of the "free time" of two days, beginning at the first 7 a. m. after placement of the car in position for loading and unloading; $22 for the second day; and $44 for each succeeding day. Service

An appeal was allowed on January 25, 1946, and appeal papers were served on January 29, 1946.

Appellants do not challenge the Commission's findings that a critical shortage of refrigerator cars existed and that there was an emergency requiring immediate action to alleviate the shortage and to prevent further shortages and congestion of traffic. Nor do they challenge the reasonableness of the demurrage charges established by the orders. The only question presented is whether the Commission's orders are orders "with respect to car service," and hence authorized by the Commission's emergency powers under Section 1 (15) of the Interstate Commerce Act as amended (49 U. S. C. 1 (15)). Appellants' contention is that the orders here involved are not orders "with respect to car service," but orders relating to "rates, fares and charges," and hence could not be made without notice and hearing. Appellees submit that the statutory provisions regarding rate-making upon which appellants rely are immaterial, inasmuch as the orders in question are orders

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Order No. 394 directs that the carriers shall not allow more than certain specified free time on refrigerator cars held for loading and unloading, *viz.*, 48 hours on domestic commerce and five days on coastwise, intercoastal or foreign commerce, and provides that all Sundays and legal holidays shall be included in computing such free time. Service Order No. 396 provides in effect that the privilege of diversion or reconsignment on perishable traffic (shipped in refrigerator cars) must be availed of within 48 hours, and if not taken within that time it is lost, with the consequence that the combination of locals instead of the through rate shall apply.

"with respect to car service," and therefore are authorized by the terms of Section 1 (15).

That section provides, in substance, that:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, * * * to suspend the operation of any or all rules, regulations, or practices then established with respect to car services.

and

> to make such just and reasonable directions with respect to car service * * * during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people.

The term "car service" is defined by Section 1 (10) of the Act as including,

> the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment.[5]

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[5] The full text of the pertinent portions of Section 1 follows:

(10) The term "car service" in this part shall include the

The car service provisions contained in Section 1 of the Interstate Commerce Act, as amended, were added by the Esch Car Service Act of May 29, 1917, 40 Stat. 101 (65th Cong., 1st Sess., H. R. 328), and subsequently amended to read as at

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use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may

present by Section 402 of the Transportation Act of February 28, 1920 (41 Stat. 456, 476–7; 66th Cong., 2nd Sess., H. R. 10453).

The legislative history of these provisions[*] makes it clear that the 1920 amendment to the definition of "car service" so as to make it include "special types of equipment" was meant to bring refrigerator cars within the purview of the Commission's power under the car service provisions (59 Cong. Rec. 3263).

The debates in Congress likewise clearly disclose that one of the evils sought to be reached, which contributed to car shortages, was the practice of shippers using the cars for storage, instead of promptly unloading them.

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after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

[*] The legislative history of the Esch Car Service Act is found in 64th Cong., 2d Sess., H. Rep. 1553; 65th Cong., 1st Sess., H. Rep. 18; 65th Cong., 1st Sess., S. Rep. 43; 55 Cong. Rec. 2018–29, 2631–2, 2699–2701, 2823–4, 2857. Regarding the amendments made by the Transportation Act of 1920, see 66th Cong., 1st Sess., H. Rep. 456, p. 17; 58 Cong. Rec. 8315–6, 8529–31; 59 Cong. Rec. 3263.

In this connection Mr. Esch, the sponsor of the legislation, declared (55 Cong. Rec. 2020–2021):

> Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals. * * *
>
> Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?
>
> Mr. ESCH. The gentleman means reciprocal demurrage?
>
> Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?
>
> Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so.

Further on Mr. Esch repeated that, "There ought to be relief by requiring the shippers and consignees to load and unload the freight promptly when cars are given to them." He pointed out that on April 1, 1917, the car shortage was something like 143,000 cars. (55 Cong. Rec. 2023.)

The constitutionality of these emergency provisions, authorizing the Commission to act without notice or hearing, was sustained in *Avent* v. *United States,* 266 U. S. 127, 130, where the Supreme Court, speaking through Mr. Justice Holmes, said:

> The right to come here depends upon the presence of some substantial constitutional question. But so far as such questions are raised we are of opinion that they are not substantial in view of previous decisions. We must take it that an emergency contemplated by the statute existed, as found by the Commission and alleged in the indictment * * * That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment. * * * That it can do so without trenching upon the powers reserved to the States seems to us not to need argument. * * * That it [Congress] can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce*

> *Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. *United States* v. *Grimaud*, 220 U. S. 506. *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 133. The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed. [Citing cases.]

The service order sustained in the *Avent* case, issued July 25, 1922, without a hearing, was also upheld in *United States* v. *Koenig Coal Company*, 270 U. S. 512, and *United States* v. *Michigan Portland Cement Company*, 270 U. S. 521.

The scope of the Commission's emergency power under the car service provisions of the Act[7] was also considered by the Supreme Court in *Peoria and Pekin Union Railway Company* v. *United States*, 263 U. S. 528, 532–5. In that case the Commission had undertaken to direct a carrier to continue to interchange freight with another road, and to switch, by its own engines and over its own tracks, freight cars tendered to it by that road. The Court held that switching was a trans-

[7] Neither the service orders here in question nor similar service orders issued during the war were issued under war powers. Congress and the Commission considered the existing powers of the Commission sufficient to deal with any transportation emergency which might arise. Annual reports of the Interstate Commerce Commission for 1939, p. 23; for 1941, pp. 1–6, 126–128; for 1942, pp. 1–6, 15–21; for 1943, pp. 51–55; for 1944, pp. 92–94.

portation service, and that the emergency powers of the Commission under the car service provisions do not include authority to require the performance of such transportation. The Court pointed out that "car service" connotes the use to which the vehicles of transportation are put, not the transportation service rendered by means of them.

Applying the criterion of the *Peoria* case to the case at bar, it is clear that the Commission's orders involved in the present suit must be sustained. They relate, not to the performance of transportation service by means of refrigerator cars, but to the use to which those vehicles are put. The charge for demurrage by the orders prescribed is not a rate payable for the performance of transportation by a carrier; it is rather a payment for detention of the carrier's vehicles, preventing their use in the performance of transportation service for other shippers.[8]

As shown by the authorities reviewed in the District Court's opinion, the imposition of a demurrage charge has traditionally been regarded in the railroad industry as a reasonable rule and regulation with respect to the use of cars, the purpose being to prevent delay in loading and unloading. Demurrage charges have not been considered to

[8] That the *Peoria* case is not to be regarded as restricting the Commission's emergency powers with respect to car service is shown by the discussion of that case in *United States* v. *Michiaan Portland Cement Company*, 270 U. S. 521, 527.

be a revenue-producing measure akin to line-haul rates, but as a deterrent device to prevent undue detention of cars.[9]

For a long period of time the Interstate Commerce Commission has repeatedly referred to demurrage charges as car service rules.[10] Orders of the Commission relating to demurrage have always been entitled "service orders," and are served upon the Car Service Division of the Association of American Railroads, as agent of the railroads subscribing to the car service and per diem agreement. The Uniform Demurrage Code, which has been in effect, as revised from time to time, since 1909, treats demurrage charges as an integral part of the regulations adopted to promote prompt release of cars and to prevent unreasonable detention of equipment. Similar expressions regarding the nature of demurrage charges are found in *Swift & Co.* v. *Hocking Valley Railroad Company,* 243 U. S. 281, and *Pennsylvania Railroad Co.* v. *Kittanning Iron & Steel Mfg. Co.,* 253 U. S. 319.

Demurrage rules and charges are in fact car service rules and charges. For permanent ap-

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[9] Demurrage is not, however, to be regarded as a penalty in the criminal law sense. *Turner Lumber Co.* v. *C. M. & St. P. Railway Co.*, 271 U. S. 259, 262.

[10] Thus in 1907 in *Cudahy Packing Co.* v. *Chicago and Northwestern Railway Company*, 12 I. C. C. 446, the Commission said: "The car-service rules of the defendant provide for a demurrage charge of $1.00 per day if cars are not unloaded within forty-eight hours."

plication they may be fixed by the Commission only after a hearing, in acting under the authority of either Section 1 (14 (a) or Section 15 (1). In the event of "shortage of equipment, congestion of traffic, or other emergency requiring immediate action," increased demurrage charges and more stringent rules may be required for temporary application, as a measure for conserving the car supply and in order to impel prompt loading by the consignor and prompt unloading by the consignee, superseding for the duration of the emergency the regularly applicable rules and charges, without a hearing.

As the District Court correctly concludes:

> Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars * * * As an integral part of the rules and regulations in respect to car service, they fall within the provisions of Section 1 (15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges.

Consequently, it seems plain that the Commission's orders involved in the present suit constitute "just and reasonable directions with respect to car service." Certainly they relate to "the use, control, supply, movement, distribution * * * and return" of refrigerator cars. (Sec. 1 (10), 1 (15).)

One of the several major purposes of the emergency powers of Section 1 (15) was to enable the Commission to take immediate action to alleviate car shortages. Among many factors which may cause or aggravate car shortages is undue delay on the part of shippers in the loading or consignees in unloading carload shipments. Empty cars for loading or loaded cars for unloading are placed upon the consignors' or the consignees' private sidetracks. A free time of 48 hours for loading or unloading is allowed, and this is deemed to be a reasonable time for that purpose. Where a consignor or a consignee takes longer than 48 hours, he is subject to demurrage charges. In normal times or times of car surplus (where the number of available cars equals or exceeds the demands) the demurrage charge is comparatively low. The normal demurrage charges are $2.20 per car per day for the first two days after the expiration of the free time and $5.50 per car per day for each succeeding day (Commission's Answer, par. III). In times of car shortage, the demurrage charges may be increased, as the only practicable means of inducing prompt loading or unloading. By Service Order No. 180 the demurrage charges have been increased and by Service Order No. 394 the free time has been reduced. The purpose of these orders is to help relieve the critical shortage of refrigerator cars now existing. These orders are thus strictly within the purpose of Section 1 (15),

and are also within the letter of that section, because they make "directions with respect to car service," *i. e.*, the "use, control, supply, movement, distribution, exchange, interchange and return of * * * cars." To induce in this manner the prompt loading and unloading of refrigerator cars results in augmentation of the "supply" of such cars, it makes a greater number of cars available for a greater number of shippers, it permits these cars to be "returned" to the loading points more promptly, and facilitates their "distribution" to shippers in various sections of the country, where they are urgently needed, to avoid spoiling of perishable crops.

The temporary increase in demurrage charges which the Commission ordered constitutes a reasonable and appropriate means of performing the duty placed upon the Commission by Congress. *McCulloch* v. *Maryland,* 4 Wheat. 316, 409–410. Unquestionably, if the Commission had issued a more stringent order expressly prohibiting the detention of cars more than 48 hours, instead of merely increasing the demurrage charge payable for such detention, the order would without doubt have been one "with respect to car service." Failure to comply with such an imperative order could have been punished criminally. *Avent* v. *United States,* 266 U. S. 127. If the Commission can thus prohibit detention absolutely, it would seem that it can *a fortiori* resort to the less harsh

remedy of imposing a deterrent but reasonable charge for demurrage.

The fact that demurrage is not specifically mentioned in Section 1 (15) does not indicate a legislative intent to exclude that subject from the scope of the Commission's jurisdiction under that section. *United States* v. *Pennsylvania Railroad Company,* 323 U. S. 612, 616. The Transportation Act of 1920 did not detract from the powers of the Commission under the Esch Car Service Act of 1917. *Ibid,* p. 618. On the contrary, the language added in 1920 enlarged the Commission's powers under Section 1 (15), by expressly providing, with respect to a matter left in doubt by the provisions of the 1917 Act, that directions might be made by the Commission "without regard to ownership as between carriers of locomotives, cars, and other vehicles." These words do not, as appellants argue, indicate that the Commission's functions under that section are confined to issuance of orders relating to detention of cars by carriers and afford no remedy against similar detention by shippers or receivers of freight. The 1917 Act was obviously applicable to shippers and receivers of freight, as well as to carriers, and the legislative history of the 1920 Act shows clearly that the purpose of the words added was to augment rather than to restrict the authority conferred upon the Commission.

Other points urged by appellants require no consideration. The allegations of unconstitution-

ality advanced by appellants amount merely to a restatement in different form of their claim that the Commission acted without statutory authority. *Baltimore & Ohio Railroad Co.* v. *United States,* 305 U. S. 507, 526. Similarly, the argument that the requirements of the Stabilization Act of October 2, 1942 (50 U. S. C. 961), have not been complied with is based upon the assumption that a temporary increase in demurrage charges, in order to induce prompt loading and unloading of cars, and thereby augment the supply thereof, is a rate increase, and not a "direction with respect to car service." The District Court was obviously correct in overruling these subsidiary contentions. And on the controlling issue, as to whether the Commission's orders were orders "with respect to car service," and hence could be made for temporary application only, without hearing in case an emergency was found to exist, the District Court's decision was also clearly right.

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question, and that the judgment of the District Court should be affirmed.

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J. HOWARD MCGRATH,
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FEBRUARY 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 917

GUSTAFUS V. IVERSEN, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

On March 25, 1946, this Court *per curiam* granted appellees' motion to affirm and affirmed the judgment below. Appellants respectfully and earnestly now move that the Court reconsider its action and permit appellants to present the merits of their case on the grounds hereinafter set forth.

The Court evidently concluded that appellants had failed to demonstrate in their brief in opposition to the motion that a substantial question is presented on this appeal. Appellants' brief was succinct; perhaps unduly so. Concededly, it did not discuss or at least elaborate upon certain points, on the theory that these

were matters which more appropriately should be reserved for consideration on the merits. Appellants are now compelled to conclude that, in their desire to conserve the Court's time and energies, and possibly unduly confident that the important and substantial character of the question presented was readily apparent, they did not make sufficient use of the opportunity then afforded them to describe fully the nature of the case and the issues in dispute.

QUESTION PRESENTED

Whether the Interstate Commerce Commission on its own initiative may issue, without affording to interested persons an opportunity to be heard in any manner before such orders become effective, orders—

1. reducing the free time, as provided in lawfully published tariffs of common carriers by railroad, for the loading and unloading of carload shipments of perishables in refrigerator cars;

2. increasing the demurrage charges, also provided in such tariffs, for the use of refrigerator cars pending loading or unloading thereof; and

3. changing the measure of the through rates, likewise provided in such tariffs, applicable on carload shipments of perishables in refrigerator cars held at points intermediate between the primary origin and ultimate destination for diversion or reconsignment.

STATEMENT OF THE CASE

Revised Service Order No. 180 and amendments and revisions thereof, and Service Order No. 394: Prior to and in effect on October 2, 1944, the common carriers by railroad operating pursuant to the provisions of the

Interstate Commerce Act, as amended, caused to be published and filed on their behalf, in accordance with the provisions of Section 6, paragraph 1, of the Act, tariffs setting forth demurrage charges for the use of refrigerator cars and other equipment and the conditions under which such demurrage charges shall be assessed.

On October 2, 1944, the Commission, on its own initiative, without complaint, without answer or other formal pleading, or without notice or hearing or the filing of any report, entered its Revised Service Order No. 180[1] which suspended the operation of all tariff rules, regulations, or charges insofar as they conflicted with the provisions of such order and directed the railroads or their agents to establish, effective at 7 A. M. on October 4, 1944, higher charges for demurrage on refrigerator cars. The provisions of Revised Service Order No. 180, with minor amendments,[2] continued in effect until 7 A. M. December 15, 1945, when pursuant to Fourth Revised Service Order No. 180[3] entered December 7, 1945, the railroads or their agents were directed to establish a new schedule of demurrage charges substantially higher than those provided in its prior orders.

On December 7, 1945, the Commission also entered Service Order No. 394,[4] which directed the railroads, effective at 7 A. M., on December 15, 1945, to include

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[1] 9 F. R. 12133 (1944).

[2] Second Revised Service Order No. 180, 10 F. R. 5724; Third Revised Service Order No. 180, 10 F. R. 6125; Third Revised Service Order No. 180, as amended, 10 F. R. 14575 (1945).

[3] 10 F. R. 14970 (1945).

[4] 10 F. R. 15008 (1945).

all Sundays and legal holidays in computing the 48-hour free time allowed for loading or unloading refrigerator cars.

As in the case of its Revised Service Order No. 180, the Commission entered its Fourth Revised Service Order No. 180 and its Service Order No. 394 on its own initiative, without complaint, without answer or other formal pleading, or without notice or hearing or the filing of any report. The railroads complied with such orders by issuing supplements to their respective tariffs, containing demurrage charges and rules which determine the application of demurrage charges, in which the orders of the Commission were set forth *verbatim*. The changes were not made upon any notice to the public and to the Commission as required under the provisions of Section 6, paragraph 3, of the Act.

The demurrage charges established by the railroads in accordance with the provisions of Section 6, paragraphs 1 to 7 inclusive, of the Interstate Commerce Act, as amended, and the demurrage charges established by the Commission in its Fourth Revised Service Order No. 180 and its Service Order No. 394 are as follows:

NORMAL CHARGES ESTABLISHED BY RAILROADS	CHARGES REQUIRED BY FOURTH REVISED SERVICE ORDER NO. 180 AND SERVICE ORDER NO. 394
Cars unloaded within 48 hours exclusive of Sundays and banking holidays, after the first seven a. m. (7:00 a. m.) following arrival of the cars at destination—no charge.	Cars unloaded within 48 hours, including Sundays and legal holidays, after the first seven a. m. (7:00 a. m.) following arrival of the car at destination—no charge.
For the first two days or fraction of a day that a car is held after expiration of the free time—$2.20 per car per day.	For the first day after the expiration of the free time—$11.00 per car per day.
For the third day and each day or fraction of a day thereafter, after the expiration of the free time—$5.50 per car per day.	For the second day after the expiration of the free time—$22.00 per car per day.
	For the third day and all successive days or fraction thereof after the expiration of the free time—$44.00 per car per day.

Service Order No. 396: Prior to and in effect on December 10, 1945, the common carriers by railroad operating pursuant to the provisions of the Interstate Commerce Act in their respective tariffs, published and filed in accordance with the provisions of Section 6, paragraphs 1 to 7 inclusive, of the Interstate Commerce Act, as amended, established through rates for the transportation of perishables in carloads in refrigerator cars from the primary origin to the ultimate destination or unloading point of such perishables and,

in connection with such through rates, authorized the diversion or reconsignment of such carload shipments from the destination specified in the original bill of lading to a new and different destination, the transportation charges to be assessed on such diverted or reconsigned shipments at the published through rates from the primary origin to the ultimate destination or unloading point.

On December 10, 1945, the Commission, again on its own initiative, without complaint, without answer or other formal pleading, or without notice or hearing or the filing of any report, entered its Service Order No. 396 [5] which directed the common carriers by railroad, effective 7 A. M. on December 15, 1945, to suspend all rules, regulations, and provisions in the lawfully published tariffs of said carriers which were in conflict with the provisions of such order, and to establish in lieu thereof a provision that carload shipments of perishables held beyond two days (48 hours), exclusive of Sundays and bank holidays, after the first 7 A. M. after arrival of the car at any point prior to delivery at the ultimate destination, and diverted or reconsigned upon request of the consignor, consignee, or owner, would be subject to the full local or joint rate to the reforwarding point plus the full local or joint rate from the reforwarding point, in effect on the date of shipment, from point of origin plus all other applicable charges previously or subsequently accruing.

The diversion or reconsignment of carload shipments of fresh fruits or vegetables in refrigerator

[5] 10 F. R. 15008 (1945).

cars, while in transit from the primary point of origin to the destination specified in the original bill of lading, has become a well-established practice in the marketing of fresh fruits and vegetables in the United States, and the effect of Service Order No. 396 is to require the common carriers by railroad to collect substantially higher line-haul transportation charges on these carload shipments of fresh fruits and vegetables which are delayed at a diversion or reconsignment point for more than forty-eight (48) hours, exclusive of Sundays and bank holidays, than would otherwise accrue at the lawfully published rates of such common carriers by railroad.

The common carriers by railroad put into effect the provisions of Service Order No. 396 by publishing supplements to their respective tariffs in the same manner as supplements setting forth Revised Service Order No. 180 and amendments and revisions thereof were published. The changes in rates resulting from the application of provisions of Service Order No. 396 were not established by the carriers in tariffs or supplements thereto which would become effective upon thirty days notice to the Commission and to the public as required under the provisions of Section 6, paragraph 3, of the Interstate Commerce Act, as amended.

Proceedings in the court below: By petition filed on December 15, 1945, plaintiffs challenged each and all of the Service Orders described above on the grounds that (1) the Commission has statutory authority to make and enter such orders only "after full hearing," and to cause them to become effective only after thirty days notice and (2) if such statutory authority exists,

it is unconstitutional in that it authorizes an administrative agency to fix rates or charges without affording interested persons an opportunity to be heard before the order fixing rates or charges becomes operative. Defendants' answer admitted that the orders were issued without notice or hearing, but asserted the orders as so made and entered, are authorized by Section 1, paragraph 15, of the Act.

The three-judge tribunal rendered its opinion[6] on January 8, 1946, and entered its order on January 15, 1946, dismissing the petition except that, with respect to Fourth Revised Service Order No. 180 and Service Order No. 394, the operation of said Orders was enjoined insofar as they provided for the inclusion in free unloading time of Sunday, Monday, and Tuesday, December 23, 24, and 25, 1945; Sunday, December 30, 1945; and Tuesday, January 1, 1946.

The opinion of the court below addressed itself wholly to the inquiry whether the Service Orders here in question suspend "rules, regulations, and practices then established with respect to car service" and make "directions with respect to car service" within the meaning of Section 1, paragraph 15. That issue the opinion resolved in the affirmative. The court failed to rule upon the constitutional issue raised by plaintiffs and, by confining its opinion to the orders relating to "free time" and demurrage charges, did not pass upon the validity of Service Order No. 396 and the changes in line-haul rates required thereby.

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[6] 63 F. Supp. 1001 (D. C. D. C. 1946).

SUMMARY OF THE ARGUMENT

I

SECTION 1 (15) OF THE INTERSTATE COMMERCE ACT NEITHER EXPRESSLY NOR BY IMPLICATION EMPOWERS THE COMMISSION TO DETERMINE OR PRESCRIBE OR TO CHANGE DEMURRAGE OR OTHER TRANSPORTATION RATES OR CHARGES

The Service Orders of the Interstate Commerce Commission under attack herein direct increases in (1) demurrage charges and (2) line-haul rates in connection with the transportation of perishable fruits and vegetables in refrigerator cars. Even insofar as only demurrage charges are involved, the charges affected by the Service Orders in question are "rates, fares, or charges" within the meaning of those portions of the Interstate Commerce Act which prescribe the manner in which "rates, fares, or charges" (including changes therein and "rules," "regulations," or "practices" affecting "rates, fares, or charges") may be determined or prescribed by the Commission. Sections 6 (1), 6 (3), 15 (1), 15 (2), and 15 (7) of the Interstate Commerce Act (49 U.S.C.A., Secs. 6 (1), 6 (3), 15 (1), 15 (2), and 15 (7); *Lehigh Valley Ry.* v. *United States*, 188 Fed. 879 (C.C.A. 3d, 1911); *Interstate Commerce Commission* v. *Detroit; G. H. & M. Ry.*, 167 U.S. 633 (1897); *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926); *Proctor & Gamble Co.* v. *United States*, 281 Fed. 1014 (S. D. Ohio 1922).

Section 1 (15) of the Interstate Commerce Act (49 U.S.C.A. Sec. 1 (15)) does not expressly authorize the Commission to determine or prescribe or to change

demurrage or other charges to be paid to railroads by shippers or consignees for "services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Section 1 (3) of the Interstate Commerce Act (49 U.S.C.A. Sec. 1 (3)). Examination of Section 1 (15) in the light of other pertinent provisions of the statute compels the conclusion that the terms "rules, regulations, and practices • • • relating to car service" and "directions with respect to car service," as employed in Section 1 (15) do not embrace "rates, fares, or charges" or "rules," "regulations," or "practices" relating thereto.

Both the legislative history of Section 1 (15) and its administrative interpretation demonstrate that the terms "rules, regulations, and practices • • • relating to car service" and "directions with respect to car service" were intended to relate to such inter-carrier matters as the exchange, interchange, and return of cars and other rolling stock. The "car service amendment"—the Esch Car Service Act (Act of May 29, 1917, c. 23, 40 Stat. 101)—stemmed from the Commission's own recommendations; the Commission had in mind only inter-carrier matters. Thirtieth Annual Report of Interstate Commerce Commission (1916), p. 73; *Car Supply Investigation*, 42 I.C.C. 657 (1917). Long prior to enactment of the "car service amendment," the carriers' schedules of demurrage and other transportation charges as well as all rules affecting such charges were *required* by the statute to be filed with the Commission. *American Warehouseman's Association* v. *Illinois Central Ry.*, 7 I.C.C. 556, 558

(1898); *Armour Grain Company* v. *Director General, Illinois Central Ry.*, 57 I.C.C. 398, 405, 409 (1920). To say that the "car service amendment," which *authorizes* the Commission to direct the carriers to file with the Commission their "rules and regulations with respect to car service" (Sec. 1 (13) of the Interstate Commerce Act, 49 U.S.C.A. Section 1 (13)), was intended to be applicable to demurrage and other transportation charges, needlessly gives effect to an anomalous result. Even as recently as June 30, 1942, the Commission seems to have been of the opinion that Section 1 (15) did not authorize it to increase demurrage charges without a hearing. Hearings on S. J. Res. 147, 77th Cong., 2nd Sess., Part I, p. 18.

The authorization to employ the emergency powers conferred on the Commission in Section 1 (15) is to be strictly construed. *Peoria & Pekin Union Ry.* v. *United States*, 263 U. S. 528, 532, 534-535 (1924); *Baltimore & Ohio Ry.* v. *United States*, 277 U. S. 291, 299-300 (1928). The doctrine of the Peoria Case was neither overturned nor modified by *Avent* v. *United States*, 266 U. S. 127 (1924); *United States* v. *P. Koenig Coal Company*, 270 U. S. 512 (1926); or *United States* v. *Michigan Portland Cement Company*, 270 U. S. 521 (1926).

II

IF SECTION 1 (15) OF THE INTERSTATE COMMERCE ACT MUST BE CONSTRUED TO EMPOWER THE COMMISSION TO PRESCRIBE OR DETERMINE DEMURRAGE OR OTHER TRANSPORTATION RATES OR CHARGES WITHOUT AFFORDING TO INTERESTED PERSONS AN OPPORTUNITY TO BE HEARD BEFORE THE COMMISSION'S ORDERS BECOME EFFECTIVE, IT IS UNCONSTITUTIONAL

There is at least grave doubt that, if Section 1 (15) empowers the Commission to order increases or changes in demurrage or other transportation rates or charges without affording interested persons opportunity for a hearing before such orders become operative, it violates the Due Process Clause. This Court, on numerous occasions, has invoked the due process clause in connection with attacks upon the procedural validity of orders of the Commission and other rate-making agencies. *United States* v. *Illinois Central Ry.*, 291 U. S. 457, 463 (1934); *Morgan* v. *United States*, 298 U. S. 468, 480-481 (1936); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51, 73 (1936); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300, 304-305 (1937); *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 392-393 (1938); *Morgan* v. *United States*, 304 U. S. 1, 14-15, 19, 20 (1938); and *Market Street Ry.* v. *Railroad Commission of California*, 324 U. S. 548, 562 (1945). In the so-called Barge Line Case, *United States* v. *Illinois Central Ry.*, *supra*, the Court took a course similar to that urged upon it by appellants here, namely, the Court construed an amendment to the Interstate Commerce Act—the so-called Denison Act (Act of May 29, 1928,

c. 891, Sec. 2, 45 Stat. 978)—so as to eliminate, as an issue before the Court, the question whether Congress could authorize the Commission to cause a rate order to become effective without having afforded interested persons an opportunity to be heard.

The Court has never upheld a rate-order issued in the summary manner as the Service Orders under attack herein were issued. *Avent* v. *United States*, 266 U. S. 127 (1924), was not a rate-order; for that matter, procedural due process was not in issue in that case. Neither *Bowles* v. *Willingham*, 321 U. S. 503 (1944), nor *Yakus* v. *United States*, 321 U. S. 414 (1944), involved a rate-order, and, in any event, the statute out of which they arose relates to wartime conditions. Section 1 (15) is applicable in time of peace as well as in wartime. *United States* v. *Guy A. Thompson, Trustee of Missouri Ry.*, 58 F. Supp. 213 (E. D. Mo., 1944).

ARGUMENT

I

SECTION 1, PARAGRAPH 15, OF THE INTERSTATE COMMERCE ACT NEITHER EXPRESSLY NOR BY IMPLICATION EMPOWERS THE COMMISSION TO INCREASE DEMURRAGE CHARGES OR OTHER TRANSPORTATION CHARGES

Appellees assert that the Commission is authorized to issue the Service Orders here challenged by virtue of Section 1, paragraph 15, of the Interstate Commerce Act, as amended, which reads as follows:

> (15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing

> find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Obviously, only clauses (a) and (b) of said paragraph 15 could afford any possible basis for appellees' contention. The sole inquiry, then, is whether the Service Orders suspend "rules, regulations, or practices • • • with respect to car service" or "make directions with respect to car service" within the intendment of those clauses.

The answer requires an examination of (1) the specific language of Section 1, paragraph 15, and the meaning of the terms used therein in the light of the general structure of the Interstate Commerce Act and the terms used in other portions of that statute; (2) the legislative history of Section 1, paragraph 15, and

the administrative interpretation of the Commission's powers thereunder; and (3) the judicial construction of Section 1, paragraph 15.

1. *The Principal Meaning of the Statute*

It is clear on the face of Section 1, paragraph 15, that the activities of the Commission contemplated thereunder relate solely to directions governing the relationships as between the carriers with respect to car service. In the first place, the Commission is empowered to act "without answer or other formal pleading by the interested carrier or carriers." Had Congress intended this paragraph to authorize the Commission to act "without answer or other pleading" by interested shippers or consignees, language to that effect should have been included.

Secondly, in clause (b), the authorization to make "directions with respect to car service without regard to the ownership as *between carriers* of locomotives, cars, and other vehicles * * *" clearly contemplates that relationship between carriers was the sole consideration.

Third, again in clause (c), the pains taken in the Act to spell out the manner in which the "terms of compensation between the carriers" are to be reached or prescribed indicate not only that Congress had in mind relationships solely between carriers but also that Congress was not willing to empower the Commission to prescribe the terms of compensation even as between the carriers except after hearing. Can it be seriously contended that Congress was so indifferent

to the rights of shippers and other patrons of the railroads to the extent that it would require the Commission to prescribe compensation as between the carriers only after hearing but would permit the Commission to prescribe the charges to be paid to the railroads by shippers and patrons without permitting them also to be heard?

Fourth, the authorization to the Commission, in clause (c), "to require such joint or common use of terminals" plainly relates only to inter-carrier relationships, confirmation of which appears in the further limitation in the same clause upon the Commission's activities to those respecting the "terms as between the carriers."

Finally, clause (d), relating to preference or priority in transportation, as well as the concluding sentence of paragraph 15, relating to the same subject, though not in terms limited to relationships as between carriers, certainly cannot be said to empower the Commission to order an increase or change in charges to be paid by shippers or other railroad patrons.

Accordingly, if the Commission is empowered under Section 1, paragraph 15, to deal with demurrage or other transportation charges, authorization must be found by construing the language of paragraph 15 in the light of other provisions of the Interstate Commerce Act.

In looking elsewhere in the statute for an illumination of the meaning of Section 1, paragraph 15, two points should be borne in mind: (1) Are the terms "rules, regulations, or practices" employed in connection with the provisions of the Act, relating to the

Commission's control over the rates or charges to be paid by shippers or other railroad patrons; and (2) is the term "car service" employed in connection with the provisions of the statute relating to the Commission's control over rates or charges to be paid by shippers or other railroad patrons?

The portions of the statute pertinent here are Section 1, paragraphs 3, 4, 5, 6, and 10 to 17 inclusive; Section 6, paragraphs 1, 3, and 7; and Section 15, paragraphs 1, 2, and 7. In Section 1 (3), the term "transportation" is defined to include

> • • • locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, • • • and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Section 1 (4) requires every common carrier by railroad engaged in the transportation of passengers or property

> • • • to establish • • • through routes • • • and • • • rates, fares, charges, and classifications applicable thereto; • • • to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, • • •.

Section 1 (5) provides, in part, that:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 1 (6) requires the carriers

> * * * to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part * * * upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 1 (10-17 inclusive) are the so-called "car-service" provisions of the statute. Examination of these provisions will be made subsequently but it is to be observed at this point that in none of these so-called "car-service" provisions is reference made to the Commission's control over rates or charges to be paid by shippers or other railroad patrons except that, in Section 1 (13), the carriers are required to file with the Commission their

> rules and regulations with respect to car service, and the Commission may, in its discretion, direct

> that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

This differentiation made in Section 1 (13) between "rules and regulations with respect to car service" and "schedules showing rates, fares, and charges for transportation" is significant, and subsequently will be given due emphasis.

Section 6 (1) provides, in part, that:

> Every common carrier * * * shall file with the Commission * * * and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

The pertinent portions of Section 6 (3) provide:

> No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after 30 days' notice to the Commission and to the public published as aforesaid, * * * *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

The pertinent portions of Section 15 (1) provide:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge * * *, or that any individual or joint classification, regulation, or practice * * *, is or will be unjust or unreasonable * * *,

> the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, * * *.

Section 15 (2) provides in part:

> Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, * * *.

Section 15 (7) provides in part:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission * * * may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, * * * the Commission may make such order with

reference thereto as would be proper in a proceeding initiated after it had become effective.
• • •

It is thus apparent that the Interstate Commerce Act carefully differentiates in its authorizations respecting "rates, fares, and charges" together with the procedure governing the Commission's control thereover and "rules, regulations, and practices" together with the procedure governing their issuance. It will be noted that, wherever provision is made for rules, regulations, or practices relating to rates, fares, or charges, the statute takes pains to employ definitive language such as "rules, regulations, or practices affecting rates, fares, or charges." For example, in Section 15 (7) the Commission is authorized to suspend for a prescribed period, pending investigation, any "schedule stating a new individual or joint rate, fare, or charge, or any individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge." In other words, the terms "rules, regulations, or practices" are not loosely used in the Act and the precise objectives in each reference are either specifically stated, as just illustrated, or may be easily ascertained from the immediately surrounding context.

The statutory scheme governing the Commission's control over rates, fares, or charges is carefully laid out. The Act, as at common law, permits the carriers to initiate the establishment of rates, fares, or charges. The carriers are required with respect to the establishment of a new rate, fare, or charge or of a change in

rates, fares, or charges to file the new or changed schedule with the Commission pursuant to Section 6. These new or changed rates, fares, or charges may not become effective within less than thirty days after filing except, pursuant to the provisions of Section 6 (3), the Commission may authorize changes in rates, fares, or charges upon less than the thirty days notice. The new or changed rates, fares, or charges become effective without further action by the Commission except that, either upon protest filed or on its own motion, the Commission may, pursuant to Section 15 (7), suspend the operation of the rate, fare, or charge and enter upon a hearing concerning its reasonableness.

The statute does empower the Commission, in Section 15 (1), to prescribe rates, fares, and charges on its own initiative, but only after full hearing.

No rate, fare, or charge may be charged, demanded, collected, or received by a carrier in an amount different from the rates, fares, and charges which are specified in the tariff filed and in effect at the time (Sec. 6 (7)). As will later appear, it is well established that demurrage charges must, like all other "rates, fares, or charges," be filed with the Commission and published in accordance with the statutory procedure above described.

The "car-service" provisions: Turning now to examination of the so-called "car-service" provisions (paragraphs 10-17, inclusive, of Section 1) the inquiry is whether there is any indication therein that the statutory scheme above described was intended to be departed from.

Section 1 (10) defines the term "car service."

Section 1 (11) makes it the duty of the carrier

> • • • to furnish safe and adequate car service and to establish, observe, and enforce • • • rules, regulations, and practices with respect to car service.

Significantly, no requirement is made that the carriers are required to establish "rules, regulations, and practices" with respect to their *charges* for "car service."

Section 1 (12) deals exclusively with coal car distribution. No reference is made to the charges for the use of such cars.

Section 1 (13) is especially significant. It authorizes the Commission to require the carriers to file with it their "rules and regulations with respect to car service" and to direct that "such rules and regulations shall be incorporated in their schedules of rates, fares, and charges for transportation." It plainly appears at this point that "rules and regulations with respect to car service" are to be differentiated from the tariffs or "schedules showing rates, fares, and charges for transportation." The latter, as noted above, are *required* by the statute (Section 6 (1)) to be filed with the Commission. If demurrage charges are "rates, fares, and charges" within the meaning of Section 6 (1), the inference is plain that the expression "rules and regulations with respect to car service" employed in Section 1 (13) does not embrace demurrage charges because Section 1 (13) would leave it *discretionary* with the Commission whether schedules showing demurrage charges should be filed with the Commission, whereas Section 6 (1) *requires* such filing.

Section 1 (14) (a) empowers the Commission, after hearing, to establish "reasonable rules, regulations, and practices with respect to car service," and further provides that such rules, regulations, and practices shall include "the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it." The analysis just preceding of the intended content of the expression "rules and regulations with respect to car service" appearing in Section 1 (13) should be kept in mind in connection with the similar language employed in Section 1 (14) (a). Moreover, the requirement that such rules and regulations shall include compensation as between carriers for the use of locomotives, cars, or other vehicles argues against any contention that the term "rules, regulations, and practices with respect to car service" was intended to include the compensation or charge which shippers or other patrons of railroads should pay for the use of railroad cars or other facilities.

Section 1 (15) has been analyzed previously herein and, as there observed, gives no indication whatsoever that the terms "rules, regulations, or practices * * * with respect to car service" and "directions with respect to car service" were intended to authorize the Commission to determine or prescribe or to change demurrage or other transportation charges. Certainly if the Commission's powers under Section 1 (14) (a) do not include control over demurrage or other transportation charges, that authority is not granted it under Section 1 (15) which adds nothing to the Commission's powers under Section 1 (14) (a) except to permit the Commission to undertake, in an emergency, the exer-

cise of its Section 1 (14) (a) powers in a summary fashion.

Section 1 (16) authorizes the Commission to reroute traffic and to direct distribution of traffic over other railroads whenever the Commission is of opinion that any carrier is for any reason unable to transport the traffic offered it so as properly to serve the public. The question may well be asked, why, if the Commission's powers under Section 1 (15) are so all-embrasive as to include objects not specified therein, such as control over demurrage or other transportation charges, was it necessary to enact a special provision empowering the Commission to reroute and direct the redistribution of traffic? The objective sought in Section 1 (16) is certainly more closely related to the objects specified in Section 1 (15) than is control over demurrage and other transportation charges. Again, the further provision in Section 1 (16) spelling out the procedure to govern the fixing of the terms "as between the carriers" confirms appellants' contention that the so-called "car-service" provisions (paragraphs 10-17 inclusive) deal with inter-carrier relationships and not with the relations between carriers and shippers or consignees.

Section 1 (17) prescribes penalties of not less than $100 nor more than $500 for each offense and $50 for each and every day of the continuation of the offense for failure or refusal on the part of any carrier, its officer, agents, and employees to obey strictly and conform promptly to orders or directions of the Commission issued pursuant to the car-service provisions of the Act. Here again, the intendment that the "car-service" provisions relate only to carriers is clear.

2. *The Legislative History and Administrative Interpretation of Section 1 (15)*

Section 1 (15) of the Interstate Commerce Act, as amended, along with all of the other so-called "car-service" provisions of the statute (Section 1, paragraphs 10-17 inclusive) has its origin in the amendment to the Interstate Commerce Act known as the Esch Car Service Act of May 29, 1917, the full text of which appears in the Appendix, p. 84. The provisions of the Interstate Commerce Act added by the Esch Car Service Act were amended as part of the extensive changes in the Interstate Commerce Act made by the Transportation Act of 1920.[7] Except in one detail not pertinent to the inquiry,[8] the so-called "car-service" provisions of the Interstate Commerce Act have not been changed since the amendments in 1920.

Examination of the legislative history of the "car-service" provisions of the Interstate Commerce Act, including Section 1, paragraph 15, thus requires scrutiny of the history of both the Esch Car Service Act and that portion of the Transportation Act of 1920 relating to these provisions.

(a) *The Esch Car Service Act.* Prior to May 29, 1917, the authority of the Commission to deal with the related problems of congestion of traffic and car shortage was limited. The matter is discussed at some length in the 1916 Annual Report of the Commission, pp. 67-74. As explained by the Commission:

The original custom of transferring freight

[7] 41 Stat. 456 (1920).

[8] 49 U. S. C. §1 (14) (b); 54 Stat. 901 (1940).

> from car to car at junction points of railroads, thereby keeping each road's cars on its own lines, was long ago abandoned in the interests of economy and good service, and was superseded by a practically universal custom of allowing cars to go through to destination under a plan arranged between the railroads for compensating each other for the use of cars on the basis of the miles cars were so used. This plan, in turn, was superseded by an arrangement for compensation on a per diem basis. Rules were adopted by the carriers which had for their purpose insuring prompt return of cars to the owning road. Fines were provided as penalties for misuse of another carrier's equipment or for loading it except in the direction of home.
>
> When business is comparatively light and there is an abundance or surplus of equipment and the transportation facilities and terminals of the carriers are not overtaxed, these rules are quite generally observed, but when business is heavy and shippers are clamoring for cars they seem to be entirely ignored, and, so far as we are advised, no effort is or has been made to assess the penalties provided in the rules for misuse of equipment. (p. 68).

The Commission dealt at length with "an acute situation" of congestion and car service which had arisen in 1906 respecting which formal hearings were had and were reported upon in 12 I.C.C. 561 (1907).

> Evidence was taken relative to conditions at widely separated points, such as San Francisco, Galveston, New Orleans, Chicago, the West Virginia coal fields, the grain fields of Iowa, Nebraska, Kansas, and Oklahoma, and the lumber-

> producing regions of Oregon, Washington, and various southern states. Substantially all told the same story of failure of transportation facilities and resulting commercial embarrassment and loss. It abundantly appeared that the movement of loaded cars was in the main and on the whole very slow. The time of movement of cars of grain from Iowa points to Chicago was shown to be as low as two days and as high as 25 days, the greater part taking from four to eight days. Serious delays to loaded cars in switching to points of unloading in large terminals and in passing through such terminals for shipment out to other cities explained much of the failure in car service. (p. 69).

Other contributing causes to the slow movement of freight and shortage of cars alluded to in the Commission's investigation in 1906 was the practice of carriers in permitting reconsignment of cars and the extent to which shippers availed themselves of reconsignment. The Commission concluded that additional statutory authority was needed to enable it to deal with the car shortage problem. The Commission said:

> If the Interstate Commerce Commission is to be vested with power to make rules under which railroads shall be required upon penalty to furnish cars to shippers, *this Commission should also be empowered to make rules under which free interchange of cars shall be effected or to require railroads engaging in interstate commerce to make such rules for their own protection and provide for their enforcement.* (p. 70. Emphasis supplied).

(In passing, it should be observed that the type of rules over which the Commission deemed it should have authority related solely to interchange and return of cars. No suggestion appeared that such rules should include the charges which shippers or consignees should pay for the use of the cars.)

The Commission's 1916 Annual Report next discussed the difficulties arising from the lack of uniformity in the carriers' "rules regarding the use and return of carriers' cars and the compensation to be paid by one carrier for the use of another carrier's cars." The Commission said:

> It is quite probable that it would be reasonable, desirable, and proper to make those rules more drastic and the compensation higher during periods of so-called "car shortage" than during other periods when there is an abundance of equipment and transportation facilities. (p. 71).

The Commission concluded:

> From these facts and experiences and a study of these considerations over a substantial period we are led to the conclusion that a reasonable degree of the desired and necessary improvement can be reached within any reasonable time only by vesting power to regulate these questions for all railroads in the appropriate federal body, and also providing means by which rules and regulations promulgated can be enforced. *We recommend that the Commission be given definite and specific authority to prescribe for all carriers by rail subject to the act rules and regulations governing interchange of cars, return of cars to the owning road, the conditions and circumstances*

under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each other for the use of each other's cars. (p. 73. Emphasis supplied).

As will presently appear, the Commission's conclusions regarding the remedies needed to enable it adequately to deal with congestion of traffic and car shortage gave rise to enactment of the Esch Car Service Act. It will be demonstrated that the provisions of that Act provided the full scope of, but went no further than, the recommendations of the Commission just quoted. It should be borne in mind also in this connection that, although congestion of car traffic was recognized to be "due in part to failure of consignees to promptly receive and remove their freight" (p. 68) and although the "practice of carriers in permitting reconsignment of cars and the extent to which shippers availed themselves of reconsignment was shown to be a strongly contributing cause for the slow movement of freight and shortage of cars" (p. 70), the Commission's recommendations for new legislation did not include a request for authority for the Commission to change the then and now existing machinery of the Interstate Commerce Act by which the Commission determines or prescribes or changes demurrage or other transportation charges. Instead, the Commission desired authority only to prescribe "rules and regulations governing interchange of cars, return of cars to the owning road, the conditions and circumstances under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each

other for the use of each other's cars" (p. 73). These were the matters with which the Commission's existing authority was deficient. Control over demurrage and other transportation charges was already provided through the filing procedure of Section 6, and the Commission concluded that if it should be empowered to prescribe the appropriate rules and regulations governing interchange of cars and to require such rules and regulations to be filed with the Commission, it would be empowered to cope with congestion of traffic and car shortage.

As a result of the Commission's recommendations bills were introduced in that same session of Congress and hearings began on February 1, 1917.[9]

Meantime, only a few days before the introduction of these bills, the Commission had completed a proceeding dealing with the same subject matter and had entered a report which demonstrates beyond all doubt the type of authority which the Commission was requesting of Congress. In *Car Supply Investigation*, 42 I.C.C. 657, decided January 18, 1917, the Commission, on November 4, 1916, had, upon its own motion, entered upon a general investigation covering all sections of the United States "concerning the supply, exchange, interchange, and return of freight cars, and all rules, regulations, and practices relating thereto," with a view of issuing such orders as the Commission might deem appropriate. The Commission, reviewing the evidence, stated that:

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[9] *Hearings before Committee on Interstate & Foreign Commerce of the House of Representatives on H. R. 19546, H. R. 20256, and H. R. 20352*, 64th Cong., 2nd Sess. February 1, 9 and 13, 1917.

> • • • for some time prior to the Commission's investigation there had been a general misuse of freight cars by substantially all of the respondent carriers. The substance of these misuses was the failure to observe the then effective car service rules 1, 2, 3, and 4, which provide for the return of cars to the owning roads, stated in Exhibit A of the appendix, adopted by the American Railway Association, whose members include all of the principal carriers of the United States subject to the act. The failure to observe these rules became a common practice as the volume of traffic increased during the past few months. Cars received for a line haul by foreign carriers were used for continuous local service on these lines and those received for switch movements received the same usage. These practices were frankly admitted by substantially all carriers, and while on behalf of some lines a desire to observe car service rules was expressed, it was stated that they could not do so unless other lines would also conform to those rules. (p. 662).

After reciting other "practices" resulting in misuse of freight cars by carriers, the Commission alluded to the fact that, during the progress of the investigation, the carriers in an effort to solve these problems voluntarily had designated a so-called "car efficiency committee" to "sit constantly in Washington to deal with the car situation." The railroad committee sought to remedy the situation by amending its then existing so-called "car-service rules" and its "code of per diem rules" so as greatly to increase the penalties provided in such rules for failure on the part of the carriers to observe them. Despite this effort on the part of the

carriers to police themselves, violations persisted on a large scale.

The Commission concluded that the situation would not be corrected unless the Commission itself should issue the rules and regulations and should use its powers to compel compliance. The Commission was troubled over its authority to take such action and adverted to the fact that, in its 1916 Annual Report, it had recommended that the Congress enact specific authority for this purpose. Despite the uncertainty respecting its authority a majority of the Commission, in a four-to-three decision, ordered the carriers to amend their "car-service rules" and "code of per diem rules" in the details which it specified. The minority dissented on the ground that the Commission was not empowered to prescribe "car-service rules" or "code of per diem rules."

It is important to pause at this point and observe that neither the "car-service rules" nor the "code of per diem rules," referred to in this proceeding and set forth as an exhibit attached to the Commission's decision, dealt in any manner with demurrage or other transportation charges, but were concerned altogether with rules and regulations as between the carriers governing the interchange and return of cars. For convenient reference these "car-service rules" and "code of per diem rules" are set forth in full in the Appendix hereto, pp. 78-83.

Commissioner Hall, appearing for the Commission, was the principal witness before the House Committee on Interstate and Foreign Commerce. He began by reading the Commission's recommendations made in

its 1916 Annual Report and described above.[10] Two of the bills before the Committee, H. R. 20256 and H. R. 20352, which were identical, had been drafted by the Commission at the specific request of a member of the Committee for the purpose of implementing the Commission's recommendations.[11] Commissioner Hall's testimony is replete with evidence that the legislation proposed by the Commission related only to the interchange and return of cars by carriers. The following colloquy is typical:

> Mr. ESCH. Is it not difficult to allow administration of car service rules to the carriers? Do not they hesitate to enforce their own penalties against a connecting carrier, supposing that connecting carrier were a feeder to it?
>
> Mr. HALL. The record before us shows that they do not enforce them and do not pretend to. The record in this investigation, Docket No. 9284, [Car Supply Investigation, 42 I.C.C. 657] shows that the commission on car service of the American Railway Association reported to the executive committee of that association on October 30, 1916, that inspection of railroad records for the month of June, 1916, speedily developed over 40,000 violations in that month and the evidence was so overwhelming that the inspection was abandoned.
>
> Mr. ESCH. They do not enforce the rules?
>
> Mr. HALL. No.
>
> The CHAIRMAN. They have power to enforce them against the shipper always?
>
> Mr. HALL. So far as demurrage is concerned,

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[10] Hearings, *supra* Note 9, at 4.

[11] *Id.* at 32.

> that is in their tariffs and they have to; but the car service rules and penalties for diversion, in violation of those rules, are not in any tariff and they do not have to.[12]

The testimony before the Committee was directed exclusively to the problem which the Commission had dealt with in its *Car Supply Investigation, supra. The term "car-service rules" recurs again and again through this testimony but in each instance it is used to refer to the "car-service rules" which were established by the carriers themselves and which had not been filed with the Commission and related solely to the interchange and return of cars by the carriers.*

The House Committee reported out H. R. 20352, the bill which had been introduced by Mr. Esch and drafted by the Commission. As reported out the bill remained in substantially the same form as originally introduced.[13]

The House Committee's report, reciting that "the bill represents the views of the Commission,"[14] reviewed the testimony made in the hearings and its emphasis upon the problem of compelling carriers to exchange and return cars to other carriers as discussed in the Commission's 1916 Annual Report and its *Car Supply Investigation,* 42 I.C.C. 657 (1917). Before H. R. 20352 could be debated in the House the session came to an end, but a virtually identical bill, H. R. 328, was reintroduced at the opening of the first session of

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[12] *Id.* at 36-37; see all pp. 32-33.

[13] 54 Cong. Rec. 4242 (1917).

[14] H. R. Rep. No. 1553 to accompany H. R. 20352, 64th Cong., 2nd Sess. (1917) 2.

the 65th Congress and reported out by the House Committee on April 23, 1917.[15]

In the course of the House debate on H. R. 328 appears the sole reference in the lengthy legislative history of Section 1, paragraph 15, of the Interstate Commerce Act, which gives any indication whatsoever that Congress may have intended to include control over demurrage charges in its grant of emergency powers to the Commission under that section. The matter referred to is as follows:

> Mr. SMITH of Michigan. I would like to inquire whether or not it is the purpose of the amendment contained in this bill to prevent the evil or prohibit the evil of storage on sidings and in cars of, for instance, coal, which seems to be the very reason for the shortage as it is now determined.
>
> Mr. ESCH. We give the commission under the proposed amendment power to expedite the movement of coal.
>
> Mr. SMITH of Michigan. Why not have a provision in the bill that will specifically compel either the railroads to move the cars within 36 or other hours——
>
> Mr. ESCH. That may be provided for by rules for demurrage or per diem charges to be enforced by the Interstate Commerce Commission.
>
> Mr. SMITH of Michigan. But notwithstanding the demurrage rates, and so forth, that evil did exist last winter greatly.
>
> Mr. ESCH. That is true.

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[15] H. R. Rep. No. 18 to accompany H. R. 328, 65th Cong., 1st Sess. (1917).

Mr. SMITH of Michigan. And led to a great deal of suffering by the people.

Mr. ESCH. That is true.

* * *

Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?

Mr. ESCH. The gentleman means reciprocal demurrage?

Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?

Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so.

Mr. MADDEN. Does the gentleman think there is anything in this bill that would justify the Interstate Commerce Commission in imposing a tax on the railroad companies for failure to furnish cars while it has adequate power under the bill to impose a tax on the shipper because he fails to unload the car? I think it ought to be reciprocal, and there ought not to be any one-sided, jug-handle law passed. This is a railroad law. It is not intended to do anything for facilitating the movement of commodities. It is intended to increase the price of commodities by

giving the railroad companies the right to charge more for freight by the addition of more demurrage.

Mr. ADAMSON. The gentleman from Wisconsin will remember that other parts of the interstate commerce law provide with reference to orders to furnish cars.[16]

Appellants earnestly contend that this reference is to be discredited because (1) *it is too meager in content and equivocal in character to outweigh the numerous and more highly rationalized references to the contrary; and* (2) *as will presently appear, the bill then being drafted and with respect to which the reference is made was greatly changed in the Senate and, as changed, was enacted.*

After passing the House, H. R. 328 was sent to the Senate and referred to the Committee on Interstate Commerce.[17] As reported out by the Senate Committee H. R. 328 was entirely rewritten.[18]

At this point a comparison of H. R. 328, in the form in which it was referred to the Senate Committee, with H. R. 328, in the form in which it was reported out by the Senate Committee, is significant. It will be recalled that the Commission's recommendations respecting car shortage legislation as set forth in its 1916 Annual Report were two-fold: (1) That it be given "definite and specific authority to prescribe for all carriers by railroad subject to the act, rules and regu-

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[16] 55 Cong. Rec. 2020-2021 (1917).

[17] 55 Cong. Rec. 2052 (1917).

[18] 55 Cong. Rec. 2631 (1917); Sen. Rep. No. 43, 65th Cong., 1st Sess. (1917).

lations governing interchange of cars, return of cars to the owning road, the conditions and circumstances under which such cars may be loaded on foreign roads and the compensation which carriers shall pay to each other for the use of each other's cars''; and (2) that the carriers should be required to ''publish, post, and file with the Commission, under the provisions of Section 6 of the Act, such rules and regulations prescribed by the Commission, and should be held to an observance of those rules and regulations just as they are held to an observance of the lawfully published, posted, and filed rates.''

H. R. 328, in the form in which it was referred to the Senate Committee, faithfully adhered to both parts of the Commission's recommendations. The Senate Committee did not change H. R. 328 with respect to the first part of the Commission's recommendations. As to the second part, demurrage charges as well as all other ''rates, fares, or charges relating to transportation'' were already required to be published, posted, and filed with the Commission under Section 6 of the Act. Manifestly, the type of rules and regulations which the Commission desired to have the Congress require the carriers to publish, post, and file as a result of the new legislation did not include demurrage charges or other rates, fares, or charges relating to transportation or rules or regulations affecting such rates, fares, or charges. Under the Senate Committee's version of H. R. 328, rules and regulations of the type referred to by the Commission were not required to be filed with the Commission under Section 6 of the Act but the Commission was given authority to direct

the filing of such rules and regulations. Thus, the basic scheme of the Interstate Commerce Act respecting the procedure to be followed in the initiation and establishment of rates, fares, or charges and all rules and regulations relating thereto was preserved, and separate provision was made for the filing of rules and regulations relating to "car service" as defined in the new legislation. *Clearly, therefore, the bill in the form being debated by the House at the time of the above referred to colloquy between Congressmen Esch and Madden was an entirely different product than that which was reported out by the Senate Committee.*

H. R. 328, as reported out by the Senate Committee, passed the Senate, was agreed to by the House without further significant amendment, and became law on May 29, 1917.[19]

(b) *The Transportation Act of 1920.* The amendments of the Interstate Commerce Act brought about through enactment of the Transportation Act of 1920, were numerous and embraced a wide variety of subjects. We are concerned here, of course, only with those provisions relating to "car service."

At the outset, it should be recalled that the pro-

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[19] 40 Stat. 101 (1917). The complete Legislative Record of H. R. 328 after it was reported out of the House Committee is as follows: Reported (H. Rept. 18), 55 Cong. Rec. 989; Debated, 2018-2029.—Amended and passed House, 2029.—Referred to Senate Committee on Interstate Commerce, 2052.—Reported with amendment (S. Rept. 43), 2631.—Debated, amended, and passed Senate, 2631, 2632, 2699, 2700.—Senate asks for a conference, 2701.—Conferees appointed in Senate, 2701.—House concurs in Senate amendment with an amendment, 2823, 2824.—Senate concurs in House amendment to Senate amendment, 2857.—Senate conferees discharged, 2857.—Examined and signed, 2961, 2964.—Presented to the President, 3025.—Approved (Public, No. 19), 3251.

visions ultimately enacted in the Transportation Act of 1920 were chosen from two greatly different bills. The provisions of the bill, H. R. 10453, 66th Cong., 1st Sess., which the House passed, and those of the bill, S. 3288, 66th Cong., 1st Sess., which the Senate passed, were reconciled only after prolonged and exhaustive consideration by the conference committee. For present purposes, it is unnecessary to elaborate upon the differences between these two bills except in one respect which will be discussed later. That exception aside, both bills were in virtual agreement concerning the proposed new provisions relating to "car service." As had been the case in connection with the Esch Car Service Act, the provisions considered and approved by the respective legislative committees pertaining to "car service" were those proposed and drafted by the commission. The nature and content of these provisions may be readily understood from the testimony of Commissioner Edgar E. Clark, appearing before the House Committee in its hearings held from July 15 to August 19, 1919.[20] The pertinent portions of Commissioner Clark's prepared statement made at the outset of those hearings are set forth in the Appendix, pp. 86-88. These excerpts thoroughly explain the purposes which the Commission had in mind respecting new legislative provisions needed to enable it to deal with the problems confronting the Commission relating to "congestion of traffic and car shortage."

It is apparent from Commissioner Clark's testimony that the proposed new language relating to "car serv-

[20] *Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4378*, 66th Cong., 1st Sess., July 15-August 19, 1919, Vol. 1, Part I.

ice" was in no way concerned with the matter of demurrage or other transportation charges, but were merely additional grants of power to the Commission to enable it to compel a more effective distribution as between the carriers of cars and other rolling stock. For that matter, the following portion of the testimony indicated that the Commission under the new legislation would not have emergency authority over demurrage or other transportation charges:

> Mr. DEWALT. Mr. Clark, would it be fair to say that what you have just discussed and read, commencing on line 4, page 7, up to the conclusion of line 9, on page 8, is a continuation of the power that is exercised by the director general under Federal control, vesting those powers now in the Interstate Commerce Commission?
>
> Mr. CLARK. Yes, it will vest in the commission some of the powers that have been and are being exercised by the director general.
>
> Mr. DEWALT. Would it be then fair to say that this would be a continuance of the exercise of power granted to the director general under the emergency then existing, to wit, the war power?
>
> Mr. CLARK. So far as preference or priority, embargoes, or movement of traffic under permits, yes. With regard to the regulation of the equipment, we now have power under the so-called Esch bill to control the movement of cars. This expands it some and takes in locomotives and other vehicles, although the other vehicles are rather nebulous at the present time.[21]

These statements are significant when it is recalled that, among the powers enjoyed by the Director Gen-

[21] *Id.* at 13, 14.

eral of Railroads under Federal control was the authority to effectuate changes in all forms of rates, fares, or charges including, of course, demurrage charges. True, the Director General could effectuate such changes only by filing the new schedules with the Commission in accordance with Section 6 of the Interstate Commerce Act, but the Commission was not empowered to suspend the Director General's rates as it could and can do with respect to schedules filed by the carriers themselves. Accordingly, Commissioner Clark's failure to assert that the new legislation would empower the Commission to continue the Director General's control over rates, fares, and charges can only indicate that no such power was intended to be vested in the Commission by virtue of the new legislation.

As previously observed, the amendments respecting "car service" proposed by the Commission were incorporated in both the House and Senate bills and were ultimately enacted without significant change.[22] One

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[22] The complete legislative records of H. R. 10453 and S. 3288 after reported out of Committees are as follows:

H. R. 10453—Debated, 59 Cong. Rec. 323, 884, 912, 950-952.—Amended and passed Senate, 952.—Senate asks for conference, 952.—House disagrees with Senate amendment and agrees to conference, 1004.—Conferees appointed, 1004.—Conference report submitted in Senate, 3043.—Debated and agreed to, 3326-3350.—Conference report submitted in House (H. Rept. 650), 3098.—Debated and agreed to, 3243-3316, 8817, 8818, 8826-8829, 8831, 8832, 8834, 8838-8546, 8849, 8851-8857, 8860-8865, 8866-8879, 8886.—Examined and signed, 3435, 3457.—Presented to the President, 3484.—Approved (Public, No. 152), 3709;

S. 3288—Debated, 59 Cong. Rec. 47, 74, 117-147, 175, 178-182, 216-240, 277-291, 316-324, 364, 394-379, 456-468, 500, 501-531, 544-548, 562-596, 641-688, 723-734, 739-761, 792-806, 807-828, 862-876, 879-912, 950-952, 8746-8760, 8829.—Conferees appointed in Senate. 952.

aspect of the Senate bill, however, deserves attention. S. 3288 was passed by the Senate in virtually the same form in which it was reported out by the Senate Committee.[23] S. 3288 proposed the establishment of a new administrative agency to be known as the "Transportation Board." The following excerpts from the Senate Report on S. 3288 describes the functions to be performed by the Transportation Board and also the functions which the bill proposed should be performed by the Interstate Commerce Commission:

> Section 7 creates a new public authority for the regulation of commerce. Its title is "Transportation Board." It is to be composed of five members, until the consolidation heretofore mentioned is complete and, thereafter, of three members. It is unnecessary to recite the details of its organization, for the bill itself is clear and explicit.
>
> The first duty of the board is to prepare and, after hearing, adopt the plan of consolidation, which has been already fully set forth. Its general powers with respect to transportation are stated in the latter part of section 10, and these include certain functions now exercised by the Interstate Commerce Commission, among which may be mentioned the following: (a) The administration of the car service act; (b) of the safety appliance acts; (c) of the hours of service acts; (d) of the locomotive boiler inspection act; and others of like character. It is also charged with a series of important duties relating to water transportation, mainly by way of investigation but leading to most important results. The commit-

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[23] Sen. Rep. No. 304 to accompany S. 3288, 66th Cong., 1st Sess. (1919).

tee hopes that this part of the bill will be carefully examined, for it is the first real recognition of the coordination of water and land transportation which must eventually be accomplished. (P. 19).

* * *

In section 24 the board is also given control over the issuance of railway securities. It is deemed unnecessary to enlarge upon this subject, because it has been so often before Congress that we are all familiar with it in a general way. The car service act, which is to be administered by the board, is greatly enlarged; and, as now proposed to be amended, will be found in section 34. The thirteenth paragraph of section 6 of the act to regulate commerce is amended in important particulars, and the administration of that paragraph is given to the board. (P. 20).

* * * *

The bill leaves with the Interstate Commerce Commission the quasi-judicial powers; that is to say, everything pertaining to rates and rate-making will be as heretofore, in the hands of the commission. The valuation of railway property, under the act of 1913, remains with the commission. The accounting or reporting system is to be conducted by the commission as inseparable from rate-making. There are many other and most important duties to be performed by the commission, so many, indeed, that the committee has some doubt whether it will be able to do its work promptly. These, however, need not be specified, as a reading of the bill and a familiarity with the existing law will disclose them. The transportation board is given, chiefly, the powers which are more nearly and directly connected with the physical operation of the railways and the issuance of securities, power over the things

> tending for safety, both to employees and the public. It is believed that the division of powers and duties has been so adjusted that opportunity for conflict or discord is practically excluded. • • • (P. 20-21).

It will be noted that the new board was to administer the "car service act" and that the Commission was to exercise the "quasi-judicial powers; that is to say, everything pertaining to rate and rate-making will be as heretofore in the hands of the Commission." It had long been established that demurrage charges, like all other rates or charges to be paid by shippers and consignees for railroad service, were required to be filed with the Commission and were subject to change by the Commission only in accordance with the quasi-judicial procedure provided in Section 15. S. 3288 did not in terms undertake to change the Interstate Commerce Act in this connection. If S. 3288 had contemplated that the agency administering the "car service act" should, by virtue thereof, be empowered to prescribe or determine or to change demurrage or other transportation rates or charges, the anomalous result would have obtained whereby both the Transportation Board and the Interstate Commerce Commission, acting entirely independently of one another, would have authority to determine or prescribe or to change such rates or charges, the Board on the theory that the schedules incorporating such rates or changes are "rules, regulations, or practices • • • relating to car service" and the Commission acting in accordance with the express mandate of Section 6 and Section 15 of the Interstate Commerce Act. True, S. 3288 did not be-

come law; nevertheless, the fact that that bill, after prolonged consideration by the Senate Committee and after extensive debate by the Senate, during the course of which no question was raised as to a conflict of jurisdiction between the proposed new agency and the Commission respecting control over rates or charges, compels the conclusion that no person who participated in the deliberations preceding enactment of the Transportation Act of 1920 entertained the notion that the "car-service" provision of the Interstate Commerce Act, including those proposed to be enacted, embraced a grant of power to determine or prescribe or to change demurrage or other transportation charges.

(c) *Administrative Interpretation of Section 1, paragraph 15.* Full reference has been made to the Commission's part in the enactment of Section 1, paragraph 15, and to its interpretation of the scope and content of the so-called "car-service" provisions recommended by it for enactment.

Long prior to the enactment of the Car Service Act and indeed virtually from the time the Commission was established, the Commission had recognized a differentiation between the rules and regulations established by the carriers affecting rates, fares, or charges and carriers' rules and regulations relating to interchange and return of cars and other rolling stock, including compensation between the carriers therefor. Section 6 of the act to regulate commerce of February 4, 1887,[24] as amended by the act of 1889,[25] and by the act of 1906,[26]

[24] 24 Stat. 379 (1887).
[25] 25 Stat. 855 (1889).
[26] 34 Stat. 584 (1906).

required carriers to "file with the Commission • • • and print and keep open for public inspection schedules showing all the rates, fares, and charges for transportation," and further provided that the schedules "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Consistently from the beginning, the Commission has interpreted Section 6 to require the filing with it of schedules showing demurrage charges. *William H. MacLoon* v. *Chicago & Northwestern Ry.*, 3 I.C.C. 711 (1892); *American Warehouseman's Association* v. *Illinois Central Ry.*, 7 I.C.C. 556 (1898); *Pennsylvania Millers' State Association* v. *Philadelphia & R. Ry.*, 8 I.C.C. 531 (1900); *Blackman* v. *Southern Ry.*, 10 I.C.C. 352 (1904); *T. M. Kehoe & Co.* v. *Charleston & W. C. Ry.*, 11 I.C.C. 166 (1905). In the American Warehouseman's Association Case the Commission said (p. 561):

> In various ways these generally described regulations are specifically stated in published freight classifications, car service rules, rate schedules, special circulars, so-called billing instructions, or bills of lading forms.

The Commission stated further (p. 589):

> The storage of freight, diversion of cars to shippers' use, part-lot distribution and recon-

signing privileges involved in this investigation are of considerable importance and value to shippers, * * *. To the extent of its value, each privilege lessens the aggregate compensation paid by shippers to carriers for transportation and terminal services. *The charges made for such services and all rules and regulations which in any wise change, affect or determine such aggregate compensation, are plainly required by the statute to be shown by the carriers upon their published rate schedules.* (Emphasis supplied).

The point to note is that, however the rules and regulations containing demurrage and other transportation charges may have been styled or captioned, i.e., "uniform demurrage codes," "demurrage rules," or even "car-service rules," they were required to be filed with the Commission in accordance with Section 6 of the Act to the extent that they contained "rules or regulations which in any wise affect or determine any part of the aggregate of aforesaid rates, fares, and charges." The Commission did not have or exercise authority to prescribe the styling or captioning of the many kinds of rules and regulations which the carriers may have promulgated either individually or collectively to govern the management of their operations. Prior to 1912, at least, demurrage rates and rules and regulations relating thereto were not infrequently included by the carriers in their so-called "car-service rules." The Commission itself took cognizance of this practice in its reported opinion in *Cudahy Packing Company* v. *Chicago & Northwestern Ry.*, 12 I.C.C. 446 (1907), saying: "The car-service rules of the defendant provide for a demurrage charge of $1 per day if cars are not un-

loaded within forty-eight hours." See also the first portion quoted above from the Commission's opinion in the American Warehouseman's Association Case.

The court below was unduly influenced by the fact that the Commission "early referred to demurrage charges as car-service rules" in concluding therefrom that the term "rules, regulations, and practices relating to car service" in Section 1 (15) embraces rules and regulations relating to demurrage charges. As has been seen, by the time of the deliberations leading up to enactment of the Esch Car Service Act, the carriers had abandoned earlier practices of including within their so-called "car-service rules" schedules of demurrage and other transportation charges, and rules and regulations relating thereto. As a consequence, when the Commission submitted its recommendations upon which the Esch Car Service Act ultimately was based, it is apparent that, in its use of the phrase "rules, regulations, and practices relating to car service" the Esch Act was referring only to rules and regulations governing exchange and return of cars by and between the carriers and the per diem or other arrangements for compensation to be paid by the one carrier to another.

It is significant that, almost immediately after enactment of the Transportation Act of 1920 and the perfection of the present language of Section 1 (15) and the other so-called "car-service" provisions of the Interstate Commerce Act resulting therefrom, the Commission took occasion again to differentiate between demurrage rules and "car-service rules." In *Armour Grain Company* v. *Director General, Illinois Central*

Ry., 57 I.C.C. 398 (1920), a reparation complaint was filed with the Commission by operators of transit grain elevators at Chicago to recover certain demurrage charges assessed against them on inbound shipments of grain which complainants were unable to unload within the "free time" allowed under the demurrage tariffs because of the congestion of their elevators, due to their inability to secure sufficient cars or to obtain permission to reload inbound cars of the western carriers for outbound movements to eastern destinations. The complaints, which were filed in 1918, attacked the demurrage rules of the carriers as unjust, unreasonable, and unduly prejudicial, asserting that these charges resulted directly from the defendant carriers' failure and refusal to furnish complainants with sufficient cars for outbound shipments from their elevators. Complainants contended that the car shortage during the period in question was considerably accentuated by the carriers' enforcement of the provisions of the "car-service rules" requiring the return of empty inbound cars of the western lines made empty at their elevators. While insisting that the demurrage charges were legally assessed, complainants attacked the lawfulness thereof because of the duty imposed by law upon the carriers to furnish shippers with cars upon reasonable request.

Among other contentions, complainants asserted that the "car-service rules" of the carriers were invalid because they had not been filed with the Commission. On this point the Commission said (p. 405):

> The complainants' further contention that the

> car-service rules were not incorporated in schedules on file with the Commission is without merit. *No direction that they should be so incorporated and filed had been made by the Commission under the car-service amendment to section* 1 *of the act, and their publication in such manner is not otherwise required by the act.* (Emphasis supplied).

The Commission concluded (p. 409):

> Upon consideration of the whole record, we are of the opinion and find that the demurrage charges were legally assessed, and that the demurrage rules are not shown to be or to have been unreasonable.

This decision of the Commission is especially revealing. In the first place, it will be noted that both the terms "demurrage rules" and "car-service rules" were involved and the Commission carefully distinguished the one from the other. Secondly, it confirms the proposition that demurrage charges are required under the Act to be filed with the Commission before they may be legally collected. Third, "car-service rules" are not required by the statute to be filed with the Commission. Finally, the Commission referred to the "car-service rules" of the carriers in the same connection as it referred to the "car-service amendment." Clearly, therefore, the term "car service" has the same meaning in both instances.

Much has been made in this case of the circumstance that, during the period of Federal control, the Director General summarily and drastically increased demurrage charges. From this circumstance it has been inferred that the Interstate Commerce Commission

participated in or was authorized to direct such action. That inference is wholly unsound and altogether misleading. In the first place, the Director General increased not only demurrage charges but also line-haul rates,[27] and the Commission does not even contend that it has authority under Section 1 (15) of the Act to determine or prescribe or to change the latter. Secondly, the Federal Control Act, while it did empower the President or such agency as he might designate, to increase rates or charges, including demurrage charges, with or without hearing, required the new or changed rates or charges to be filed with the Commission in accordance with Section 6 of the Interstate Commerce Act. The Commission, upon complaint, was required to enter upon a hearing concerning the reasonableness of such rates or charges and, on the basis of such hearing, determine the lawfulness of the Director General's new or changed rates or charges.[28] Third, the exercise of summary control over rates and charges by the Director General, far from indicating that Section 1 (15) empowers the

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[27] See Effect of the Federal Control Act upon the Decision of Controversies by the Commission, 32nd Ann. Rep. I. C. C. (1918) 12-17 inclusive.

[28] Changes Effected under the Federal Control Act in the Initiation of Tariffs, 32nd Ann. Rep. I. C. C. (1918) 12; *Willamette Valley Lumbermen's Association* v. *S. P. Co.*, 51 I. C. C. 250 (1918). See also *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143 (1923); and *Turner, Dennis & Lowry Lumber Company* v. *Chicago, M. & St. P. Ry.*, 271 U. S. 259 (1926). Both involved the validity of determinations by the Interstate Commerce Commission, after full hearing, that certain increased demurrage charges initiated by the Director General and filed with the Commission were, in the one case reasonable, and, in the other case, unreasonable.

Commission to exercise similar authority over rates and charges, evidences precisely the contrary. It is more reasonable to contend that, had the Commission, during the emergent period of Federal Control, possessed statutory authority to change rates, fares, or charges, or even only demurrage charges, the Commission would have made its powers available to the Director General during World War I just as it has sought during World War II to make available its alleged authority over demurrage charges to the Office of Defense Transportation. Instead, the Commission during the period of Federal control did not find it "necessary to resort to the summary power conferred by the Esch Car Service Act." [29]

Finally, the Commission, though frequently in the meantime it exercised its emergency powers in other respects under Section 1 (15),[30] gave no indication, for more than 20 years after enactment of the "car-service" amendments and until well after World War II had commenced, that it construed Section 1 (15) to empower it to establish or change demurrage or other transportation charges. Even as late in the life of the "car-service" provisions as June 30, 1942, the Commission seemed to be of the opinion that Section 1 (15) gave it no such authority. Testifying before a sub-

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[29] 32nd Ann. Rep. I. C. C. (1918) 4.

[30] For many years, the so-called "Service Orders" entered by the Commission from time to time were not officially reported, except as they were "summarized" in the Commission's Annual Reports. See 1920 Ann. Rep. 11; 1921 Ann. Rep. 45; 1922 Ann. Rep., 9; 1923 Ann. Rep. 51; 1924 Ann. Rep. 62; 1925 Ann. Rep. 58; 1926 Ann. Rep. 62; 1927 Ann. Rep. 35; 1929 Ann. Rep. 53; 1932 Ann Rep. 77; 1933 Ann. Rep. 67.

committee of the Senate on Interstate Commerce [31] in connection with a proposed Senate resolution which would, by statute, have provided drastically increased demurrage charges, Commissioner Aitchison stated:

> Section 15(2) of the Interstate Commerce Act provided that, except as otherwise provided in part I, relating to rail transportation, all orders of the Commission under that part, other than orders for the payment of the money, shall take effect within such reasonable times, not less than 30 days, as shall be prescribed in the order. But in section 1(15) the Commission is empowered in times of shortage of equipment, congestion of traffic, or other emergency requiring immediate action, to issue orders with respect to car service without notice or hearing and effective at once. Under Section 1(10) car service is defined as including the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property. While that is the definition of the statute, it is clearly demonstrable from the cases in the courts and before the Commission that "car service" rules as commonly understood embraced demurrage practices and charges.
>
> *In other words, the statutory definition of "car service" in section 1, paragraph 10, is narrower than the usual meaning applied to the words at the time the statute was enacted.* (Emphasis supplied).

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[31] *Hearings before Committee on Interstate & Foreign Commerce of the Senate* on Sen. J. Res. 147, Part I, 77th Cong., 2nd Sess. (1942) 19.

Commissioner Aitchison's remarks reveal that he, speaking for the Commission in 1942, interpreted the term "car service" used in Section 1 (10-17) not to embrace demurrage "practices and charges."

3. *Judicial Construction of Section 1, Paragraph 15*

Court decisions pertaining to a consideration of the Commission's authority under Section 1 (15) to issue the Service Orders under attack herein fall within two groups: (a) Those holding that demurrage charges and rules and regulations relating thereto are "rates, fares, or charges for transportation" within the meaning of Section 6 and Section 15 of the Interstate Commerce Act; and (b) those directly interpreting the extent of the Commission's powers under Section 1 (15).

(a) *Demurrage charges are "rates, fares, or charges for transportation."* The court below misconstrued appellants' contention in this connection when it said:[32]

> Appellants argue that demurrage charges are "rates, fares, and charges for transportation" and that the term "rules, regulations, or practices" has no relation to the fixing of rates, fares or charges. They cite *Lehigh Valley R. Co.* v. *U.S.*, 188 F. 879 (C.C.A. 3d, 1911). That case holds that demurrage charges must be filed with the Commission and, when filed, must be observed as filed. But the section of the statute there relied on (Section 6 of the act of 1887, as amended) requires that the filed schedules shall include "all

[32] 63 F. Supp. 1001, 1006.

other charges which the Commission may require," and "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges." It seems to us that the argument of plaintiffs in this respect is a *non sequitur*, and, further, that the case cited does not support the point made. If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation.

Elsewhere in its opinion,[33] the court below relied exclusively upon an 1894 opinion of the Virginia Supreme Court of Appeals as authority for the proposition that a demurrage charge is "neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed."[34] The Virginia case may be readily discredited by the discovery that it was concerned entirely with a state statute prohibiting railroad carriers to charge or receive "any fee or commission other than the regular transportation storage and other charges authorized by law for such railroad."[35] The decision in no way involved an interpretation of the Interstate Commerce Act.

The case relied upon in the court below by appellants, *Lehigh Valley Ry.* v. *United States*, 188 Fed. 879 (C.C.A. 3d, 1911), involved indictments under the Interstate Commerce Act for rebating certain demurrage charges. Among the questions involved was

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[33] *Id.* at 1004.

[34] Norfolk & W. R. Co. v. Adams, Clement & Co., 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530 (1894).

[35] Virginia Code (1887) §1203.

whether the Interstate Commerce Act requires "rules, tariffs, and schedules relating to demurrage charges to be filed with the Interstate Commerce Commission?" (p. 884). It was essential to a determination of this question to determine whether schedules of demurrage charges were required to be filed with the Commission pursuant to Section 6 of the Act which provides, in part, that "every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation."

The court said (pp. 884-885):

> That the Commerce Act requires that every common carrier engaged in interstate commerce shall file with the Interstate Commerce Commission, and publish and keep open for public inspection, all rates, fares, and charges, stating separately all terminal charges, and that such terminal charges including demurrage charges, is established (1) by the words of the Act; (2) by the decisions of the Interstate Commerce Commission; and (3) by the rulings of the Federal courts.

In elaborating upon this summarization the court quoted excerpts from numerous court and Commission decisions, including that of this Court in *Interstate Commerce Commission* v. *Detroit, G. H. & M. Ry.*, 167 U.S. 633, (1897), in which the Court was called upon to review a determination of the Commission, made only shortly after it was established, that cartage is a "terminal charge" or can be regarded as a "rule

or regulation" which in any wise "changes, affects, or determines" any part or the aggregate of the rates, fares, and charges within the meaning of Section 6 of the Act. The Court concluded (p. 646):

> However, in a matter of this kind, much should be left to the judgment of the Commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers.[36]

This Court, in *Turner, Dennis & Lowry Lumber Company* v. *Chicago, M. & St. P. Ry.*,[37] said:

> *The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the*

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[36] The Circuit Court of Appeals in the Lehigh Valley Case further stated (p. 886):

> To hold otherwise than that demurrage is part of transportation and part of the terminal charges would be to open the door to a railroad company to allow favored patrons to occupy the tracks and the cars for such demurrage charges as they chose. Transportation includes the hiring of the vehicle and the hauling of it to its destination. The rates are based to some extent upon the time the car is used and out of service to the railroad company, because if not unloaded it is still in use. It is not a penalty. In the ordinary use of a car the time of the journey measured by miles is calculated and considered as well as the cost of moving it in fixing the charges. When the journey is finished of course the cost of moving ceases, but the use of the car remains. The aggregate of the rates is therefore affected and clearly comes within the Hepburn act.

[37] 271 U. S. 259, 262 (1926).

> *Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.* (Emphasis supplied).

In *Proctor and Gamble Co.* v. *United States*,[38] demurrage charges for failure to load and unload cars within the "free time" permitted by the rules of the railroad companies were held taxable as part of the charge for transportation, under Revenue Act 1917, Secs. 500-503, and Revenue Act 1918, Secs. 500-502 (Comp. St. Ann. Supp. 1919, Secs. 6309 1/3a-6309 1/3c), imposing a tax on the amount paid for transportation, since "demurrage" is a terminal charge, a part of the charge for transportation, even if the purpose of demurrage is primarily to prevent the detention of cars. See also *Hines, Director General of Railroads* v. *W. F. Richardson, Jr., Co., Inc.*, 290 Fed. 162 (C.C.A. 4th, 1923); *Southern Ry.* v. *Prescott*, 240 U.S. 632 (1916); and *Indiana Harbor Belt R. Co.* v. *Jacob Stern & Sons*, 37 F. Supp. 690 (N. D. Ill. 1941). In the case last cited, the court said (p. 692):

> Demurrage charges are not a part of the line haul rate charged for the movement of the shipment. They are transportation charges assessed for the storage of the shipment, before or after movement, either in a carrier's car, or on a carrier's track, * * *.

It is clearly established, therefore, that demurrage charges are "rates, fares, or charges for transportation" within the meaning of Section 6 of the Act and, as such, may be put into effect only after the notice

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[38] 281 Fed. 1014 (S. D. Ohio 1922).

and hearing procedure prescribed or provided in Section 6 and Section 15 of the Act.

(b) *Judicial interpretation of Section 1, Paragraph 15.* This Court has not passed or commented directly upon the authority of the Commission, under the so-called "car-service" provisions of the Act, to fix or change demurrage or other transportation charges. But, in considering the Commission's administration of these provisions in other respects, the Court has indicated clearly that the Commission's powers thereunder are not as broad as appellees here assert.

In *Peoria & Pekin Union Ry.* v. *United States*, 263 U.S. 528 (1924) suit was brought by a terminal carrier to enjoin an order of the Commission requiring the terminal carrier to switch freight cars tendered to a connecting carrier. As in the case at hand, the Commission's order was issued, without notice or hearing, under the purported authority of Section 1 (15). The Court's opinion rendered by Mr. Justice Brandeis after a close scrutiny of the language of Section 1 (15) and Section 1 (16) and after a review of the legislative history of the "car-service" provisions, said (p. 532):

> • • • None of these provisions grants in terms power to require the performance of a transportation service. The specific grant in paragraph 16 of the emergency power to "make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads," and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted. • • •

Elsewhere in the opinion, the Court set the pattern by which the scope of Commission activity under Section 1 (15) is to be measured (pp. 534-535):

> Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end; and *the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication.* (Emphasis supplied).

"Switching service," said the Court (p. 535), "differs in character from those as to which such power is expressly granted." Similarly, it is submitted, fixing or changing charges for transportation "differs in character" from the powers expressly granted.

Subsequently, in *Baltimore & Ohio Ry.* v. *United States,* 277 U.S. 291 (1928), the Commission contended that a controversy over the payment by railroad lines east of the Mississippi River of transfer charges on west-bound through freight traffic moving through St. Louis and East St. Louis on combination rates involved a "practice" within the meaning of certain provisions of the Act, including Section 1 (11); and that, accordingly, the Commission was authorized to determine the reasonableness of the "practice." The Court said (pp. 299-300):

> The word "practice," considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its

> meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it.

This decision, of course, not only reaffirms the doctrine of the Peoria Case, *supra*, that the "car-service" provisions of the Act are to be strictly construed, but also corroborates appellants' contention that such terms as "rules," "regulations," and "practices" are not loosely used in the statute but are to be confined to the context in connection with which they immediately appear.

Appellees rely upon *Avent* v. *United States*, 266 U.S. 127 (1924); *United States* v. *P. Koenig Coal Company*, 270 U.S. 512 (1926); and *United States* v. *Michigan Portland Cement Company*, 270 U.S. 521 (1926), and contend that the last of these decisions delimits the strict construction doctrine of the Peoria Case.

The Avent, Koenig, and Michigan Portland Cement Cases all involved Service Order No. 23, issued July 25, 1922,[39] which directed that coal cars should be furnished to the mines according to a certain order of purposes numbered in classes 1, 2, 3, 4, and 5, and that no coal embraced in classes 1, 2, 3, and 4 should be subject to reconsignment or diversion except for some purpose in the same or a superior class.[40]

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[39] Service Order No. 23 remained in effect from July 25 to September 20, 1922.

[40] This well-known order of the Commission is described in detail by the Court in the Koenig Case, 270 U. S. 512, 515-516.

All three cases arose on indictments based on preferences or concessions received by or through the activities of the respective defendants in violation of the order. The sole question in the Avent Case was the constitutionality of the delegation to the Commission to issue such an order; that the "car-service" provisions of the Act clearly contemplated orders like Service Order No. 23 was neither challenged nor discussed. In the Koenig Case, the Court addressed its opinion entirely to the proposition (not here involved) that "the offense under which the indictment is drawn can not be committed without the guilty knowledge and collusion of both the shipper and the carrier." [41]

The Michigan Portland Cement Case is the only one of the three decisions relied upon by appellees in which the statutory construction of Section 1 (15) was in issue. It was urged, in opposition to the validity of Service Order No. 23, that Section 1 (15) did not authorize the Commission to fix preferences and priorities in "transportation," as distinguished from preferences and priorities in "car service." The Court rejected this contention, but, in so doing, did not overrule the holding in the Peoria Case, but carefully distinguished the Peoria Case on the ground

[41] 270 U. S. 512, 517-518. Commenting on the Koenig Case, the Court, in the Michigan Portland Cement Case, said (p. 523):

> * * * The District Court sustained the demurrer to this indictment on the same ground as in the *Koenig Case*—that the Elkins Act requires the collusion of the carrier with the shipper and the carrier's conscious violation of law in the concession granted, and that, when this is negatived in the indictment, the indictment must fail. That ground we have held to be without weight in the *Koenig Case*. It was the only one pressed on us.

that Section 1 (15) expressly empowers the Commission in clause (d) to give "directions for preference or priority in *transportation*, embargoes, or movement of traffic under permits * * *." (Emphasis supplied). This is far from holding that the strict construction [42] doctrine of the Peoria Case was overturned by the Court in these three cases. Indeed, these three cases may be said to reaffirm the doctrine announced in that decision.

II

IF SECTION 1, PARAGRAPH 15, OF THE INTERSTATE COMMERCE ACT EMPOWERS THE COMMISSION TO ORDER INCREASES IN DEMURRAGE OR OTHER TRANSPORTATION CHARGES WITHOUT AFFORDING OPPORTUNITY FOR HEARING BEFORE THE INCREASES BECOME EFFECTIVE, THAT PROVISION OF THE ACT IS UNCONSTITUTIONAL

By way of preliminary reminder, the burden on appellants in connection with the constitutional aspects of their case will, under well-established precedents, be satisfied if appellants show simply that there would be grave doubt of its constitutionality, should Section 1 (15) be construed to authorized the Commis-

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[42] Appellants' characterization of the doctrine of the Peoria Case as one of "strict construction" is not original. In the Michigan Portland Cement Case, Mr. Chief Justice Taft, describing the Peoria Case, said (270 U. S. 521, 527):

> * * * There the Interstate Commerce Commission sought under §15 to compel a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connection carrier. It was held that the exercise of the emergency power of the Commission in transferring car equipment from one carrier to the use of another under paragraph 15 was strictly to be construed, * * *.

sion to issue the Service Orders under attack herein.[43] Certainly the foregoing discussion of the scope and content of the "car-service" provisions of the Act demonstrates that these provisions *may* be construed so that they do not embrace the authority assumed by the Commission.

Moreover, appellants' task at this stage of the proceeding before the Court is to demonstrate that their appeal, even though a matter "of right,"[44] involves a substantial question. Appellants have discussed in considerable detail the background and interpretation of the statutory language. The very nature of that material compelled that it be set forth at length. The constitutional issue, on the other hand, requires no equivalent elaboration.

Assuming that the statute must be construed to embrace the authority here exercised by the Commission, the issue squarely before the Court is whether an administrative agency may be empowered to make rates without a hearing. In view of the undeviating legal precedents previously examined there can be no doubt but that demurrage charges are rates. (In any event, it has not even been asserted in this case that the charges affected by Service Order No. 396 are not rates in the most technical meaning of that term. The

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[43] A statute should be construed, if fairly possible, not only to avoid the conclusion that it is unconstitutional but also grave doubt on that score. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and cases cited therein; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U. S. 440 (1937).

[44] United States v. Hancock Truck Lines, 324 U. S. 774, 778 (1945).

court below gave no consideration to the nature of the charges affected by Service Order No. 396.) Stressing the admittedly dual nature of demurrage charges as "in part compensation and in part penalty,"[45] the court below evidently deemed it was warranted in ignoring the constitutional issue urged upon it by the plaintiffs. That issue, however, cannot be avoided in such a conceptualistic manner. Whatever the nature of demurrage charges, they involve payments of money by shippers or consignees to railroads for services offered by the carriers. As such, they are indistinguishable from rates for purposes of applicability of the due process of law clause to the procedure which must govern an administrative agency in causing them to become operative.

This Court has, on numerous occasions, invoked the due process clause in connection with attacks upon the procedural validity of orders of the Interstate Commerce Commission and other rate-making agencies. *Interstate Commerce Commission* v. *Louisville & Nashville Ry.*, 227 U.S. 88, 91 (1913); *New England Divisions Case*, 261 U.S. 184, 203 (1923); *United States* v. *Illinois Central Ry.*, 291 U.S. 457, 463 (1934); *Morgan* v. *United States*, 298 U.S. 468, 480-481 (1936); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51, 73 (1936); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300, 304-305 (1937); *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 392-393 (1938); *Morgan* v. *United States*, 304 U.S. 1, 14-15, 19, 20 (1938); and *Market Street Ry.* v.

[45] 63 F. Supp. 1001, 1005.

Railroad Commission of California, 324 U.S. 548, 562 (1945). In the Ohio Bell Telephone Case, a hearing was stated to be a "minimal requirement" (301 U.S. 292, 305). In the St. Joseph Stock Yards Case, even the dissenting opinion declared (298 U.S. 38, 73):

> The inexorable safeguard which the due process clause assures that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Perhaps the case most squarely in point is the so-called Barge Line Case, *United States* v. *Illinois Central Ry., supra.* In 1928, Congress enacted the so-called Denison Act [46] having the purpose to foster and preserve the development of inland waterways transportation. In order to compel the railroads to join promptly with water carriers in the maintenance of through routes and joint rates, Congress provided, first, that the Commission should be empowered, without hearing, to prescribe the minimum differentials to exist between the all-rail rates and the joint rates and water rates, and, second, that if the carriers were aggrieved they could, by filing a complaint, obtain a full hearing. The Denison Act made no provision for a suspension of the Commission's rate orders pending

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[46] c. 891, Sec. 2, 45 Stat. 978. For a review of this legislation, and its treatment by the courts, see Hosmer, *The Denison Act: An Experiment in Administrative Law* (1943), XI. C. C. P. Journal 1007.

the subsequent hearing. In the district court, it was contended that Congress had intended the Commission to employ the suspension powers provided in Section 15 (7) of the Interstate Commerce Act. The district court, however, concluded[47] that the Denison Act should be considered independently of the Interstate Commerce Act and, on that basis, found the statute unconstitutional. The district court said (p. 1010):

> • • • Many authorities may be cited holding that an order establishing rates, without hearing the public service corporations affected thereby, violates the guaranty of the Fifth Amendment of the Constitution. Cases cited by the plaintiffs (and these are familiar cases to this court), such as *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431; *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 38 S. Ct. 122, 62 L. Ed. 337; and *Manufacturers' Railway Co.* v. *United States*, 246 U.S. 457, 38 S. Ct. 383, 62 L. Ed. 831, although they involve statutes which provide for a public hearing, sustain the general principle that in the exercise of the rate-making power by administrative bodies, a hearing must be accorded the parties affected in order to afford due process of law. The same constitutional question, from a somewhat different viewpoint, is raised by the plaintiffs when they assert that, since the commission made the order complained of without legal evidence to support it, the order is necessarily void. See *United States* v. *Abilene & Southern Railway Co.*, 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016. The necessity for a hearing when the com-

[47] 3 F. Supp. 1005 (1933).

> mission exercises its rate-making power over public service corporations is pointed out by Mr. Justice Cardoza in *Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294, 53 S. Ct. 350, 77 L. Ed. 796, decided February 6, 1933. In *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 284 U.S. 248, 52 S. Ct. 146, 76 L. Ed. 273, it was held that a fair hearing is a fundamental requirement in the discharge by the commission of its duty of determining reasonable rates.

This Court reversed the court below by holding that the Denison Act was to be interpreted in the light of the then existing provisions of the Interstate Commerce Act, including the suspension powers available to the Commission under Section 15 (7). In that manner the constitutional question was avoided. Even so, this Court said (291 U.S. 457, 463):

> Without attempting to lay down any general rule, but confining ourselves to the statute and case in hand, we accordingly hold that it was not essential, under the due process of law clause, that a hearing should be accorded in advance of the initiating order. It is enough that opportunity was given for a full and fair hearing before the order become operative.

The decision in that case would seem to be controlling here. In the first place, the objective of Congress in passing the Denison Act, as it was in enacting Section 1 (15), was to empower the Commission to act expeditiously and with a minimum of procedure. Nevertheless, the Court could find no valid basis for construing the statute so as to dispense with the ne-

cessity for a hearing before the rate determinations of the Commission should become legally operative. Secondly, the district court's opinion was squarely to the effect that the statute was unconstitutional because, as construed by that court, it empowered the Commission to enter rate orders without affording an opportunity to be heard. Finally, the doctrine announced by this Court in the Barge Line Case has been reaffirmed in *Opp Cotton Mills, Inc.* v. *The Administrator*,[48] 312 U.S. 126 (1941), in which the Court said (pp. 152-153):

> The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.

Avent v. *United States*, 266 U.S. 127 (1924), although holding that the Fifth Amendment does not prevent the Congress from delegating to the Commission authority to issue the Service Order involved in that case, is inapposite here. Neither demurrage nor any other rates or charges for transportation were affected by the Service Order involved in the Avent Case. As previously observed,[49] the subject matter—preferences and priorities in the use of coal cars—dealt with there was clearly within the powers of the Commission enumerated in Section 1 (15). Moreover,

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[48] See Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making* (1941), 27 Wash. U. L. Q. 1, 7 *et seq.*

[49] pp. 65-66, *supra*.

the Avent Case is not authority for the proposition that the Commission may issue an order even of that character without a hearing. Procedural due process was not in issue in that case.[50]

The Court's recent companion decisions in *Bowles* v. *Willingham*, 321 U.S. 503 (1944), and *Yakus* v. *United States*, 321 U.S. 414 (1944), give little aid to appellees here. In the Bowles Case the Court, in connection with the contention that decisions like *Morgan* v. *United States*, 304 U.S. 1, 19, 20 (1938), *supra*, frown upon the administrative procedure devised in the rent control provisions of the Emergency Price Control Act of 1942,[51] said (p. 520):

> Language in the cases that due process requires a hearing before the administrative order becomes effective * * * is to be explained on two grounds. In the first place, the statutes there involved required that procedure.

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[50] The report of the case contains no indication that procedural due process was in issue and affirmatively shows otherwise. None of the cases cited in the Court's opinion questions the necessity for notice and hearing incidental to administrative action. For that matter, many of the cases cited in the Court's opinion, such as *Interstate Commerce Commission* v. *Illinois Central Ry.*, 215 U. S. 452 (1910); *Union Bridge Company* v. *United States*, 204 U. S. 364 (1907); and *Mutual Film Company* v. *Industrial Commission of Ohio*, 236 U. S. 230 (1915), involve statutes in which notice and hearing were expressly required. A close analysis of the brief of the plaintiffs in error in this Court in the Avent Case and of the Court's opinion therein will reveal that only substantive due process was involved. The opinion of the Court would have been the same, word for word, whether Service Order No. 23 had been issued after full hearing or in the summary manner in which it was issued.

[51] 56 Stat. 23, 50 U. S. C. App. (Supp. II) Sec. 901 et seq., 50 USCA App., Sec. 901 et seq.

Secondly, as we have held in *Yakus v. U. S., supra,* Congress was dealing here with the exigencies of wartime conditions and the insistent demands of inflation control.

Certainly, the Court, in observing that statutes involved in cases like the Morgan Case required administrative hearing, could not have intended in such a cursory fashion to dispose of the numerous references over years of adjudication of the procedural requirements of due process of law in the field of administrative rate making. Price-fixing, though similar in economic result, has an altogether different history than public utility rate-making.[52] In any event, the Court's second ground for distinguishing cases like the Morgan Case is not pertinent in the case at hand. The Service Orders under attack herein do not stem

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[52] See Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942), 51 Yale L. J. 1093, at p. 1105:

> "Even though rate-fixing and wage-fixing are all a part of price-fixing in the broad sense, still it is unwise to lump all price-fixing together and fit the same procedure pattern to every proceeding. A public utility rate case has little in common with a price-ceiling problem under the Emergency Price Control Act of 1942 concerning such a question as freezing all retail prices on gasoline in the East, or even less in common with more general freezing orders. Milk prices and wages are different from both utility rates and price ceilings. How to proceed so as to assure exercise of an informed judgment and protection of affected interests does not entail a mere reference to legal conceptualism—putting price-fixing in the slot and getting a jack-pot of trials. The problem is intensely practical. Its solution lies in analyzing the materials needed in the various proceedings, and ascertaining what means will best assure enlightened action that will take into account what the parties have to offer by way of information, persuasion, and testing."

from any war time powers of the Commission. That portion of Section 1 (15) invoked by the Commission in issuing such orders is applicable at any time, whether in time of peace or war, whenever the Commission makes the findings of emergency specified in the statute.[53]

CONCLUSION

It is submitted, therefore, that Section 1 (15) of the Interstate Commerce Act, as amended, neither expressly nor by implication empowers the issuance of the Service Orders here in question; that if Section 1 (15) must be so construed, there is grave doubt as to its constitutionality; and that, in any event, the question involved is sufficiently important and substantial to entitle appellants an opportunity to be heard by this Court with respect thereto.

Respectfully submitted,

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ASHLEY SELLERS,
Counsel for Appellants.

111 Kellogg Building,
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April 19, 1946.

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[53] For instances of exercise by the Commission of its Section 1 (15) authority in time of peace, see the list of Service Orders set forth in Note 30, p. 56, *supra*. That the war powers are not involved see *United States* v. *Guy A. Thompson, Trustee of Missouri Railroad Company*, 58 F. Supp. 213 (E. D. Mo. 1944).

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

HASKELL DONOHO,

DALE C. DILLON,

ASHLEY SELLERS.

APPENDIX

Car-Service Rules and Code of Per Diem Rules of the American Railway Association in Effect on February 21, 1917.

(As set forth in Exhibit A, attached to letter from Charles J. Faulkner to W. C. Adamson and placed in the Record of the House Committee Hearings preceding enactment of the Esch Car Service Act. Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 64th Cong., 2nd Sess. on H. R. 19546, H. R. 20256, and H. R. 20352, February 1, 9, and 13, 1917, pp. 87-88.)

EXHIBIT A

CAR SERVICE RULES

[Effective February 21, 1917]

1. (a) A foreign car received under load may be forwarded to destination.

(b) An empty foreign car must be promptly handled. It must be handled in accordance with rule 2, 3, or 4.

(b1) That a foreign car may be loaded in local service in the direction of the home road or home route, or

(b11) May be moved once, loaded or empty, locally in an opposite direction from the home road or home route if to be loaded according to rule 2 or 3, or locally in the direction of the home road or home route.

This proviso does not apply to cars coming under the provisions of Rule 2(b).

(c) The movement of a foreign car, excepting as provided in these rules (1, 2, 3, or 4), will constitute a diversion.

(d) A subscriber[1] road receiving a loaded car from

[1] Subscriber—A road which is a subscriber to the per diem rules agreement.

a nonsubscriber[2] road, an industrial road, or a shipper must require that such car be routed in accordance with rule 2 or 3.

(e) Foreign cars must be utilized as far as practicable for loading to other lines, in accordance with rules 2 and 3, in preference to system cars.

(f) Any road shall have the right to agree with any other road to deviate from car service rules 1, 2, 3, and 4, inclusive, in the handling of their cars.

2. (a) A foreign car belonging to a direct connection[3] may be loaded (via any route) so that the home road shall participate in the freight rate; or must be returned to the home road direct.

NOTE—Where a movement of traffic, in the opinion of the carriers interested, requires the return of empties at the junction point where delivered loaded and such carriers fail to agree, an appeal may be made to the Per Diem Rules Arbitration Committee, whose decision in the matter shall be final.

(b) A car when empty at a point of interchange with the home road must be confined to the switching territory of the holding road, and returned to the home road at such point, loaded or empty.

(c) An empty car may be short routed to its owner at a reciprocal rate of 3½ cents per mile, plus bridge and terminal arbitraries, with a minimum of 100 miles

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[2] Nonsubscriber—A road which is not a subscriber to the per-diem rules agreement.

[3] Definition of "Direct Connection."—All lines interchanging cars at a common point, or within switching limits, either over their own rails through an intermediate line or lines, or via a car ferry or float within such switching limits, shall be considered direct connections under these rules.

This information should be published in *The Official Railway Equipment Register*, and when the interchange is other than over their own rails the channel through which interchange is effected must be shown.

for each road handling the car, the road requesting the movement to pay the charges.

3. A foreign car belonging to other than a direct connection must be delivered:

(a) Loaded (via any route) so that the home road shall participate in the freight rate, or

(b) Loaded (via any route) to a direct connection of the home road, or

(c) Loaded via any road to any point on a road forming a part of the home route, as evidenced by continuous home route card.

(d) Empty to any road on the home route, as evidenced by continuous home route card.

(e) An empty car may be short routed to its owner or to a point on the home route, at a reciprocal rate of 3½ cents per mile, plus bridge and terminal arbitraries, with a minimum of 100 miles for each road handling the car, the road requesting the movement to pay the charges.

4. (a) A loaded foreign car may be delivered to a switching road to be unloaded within the switching district. Such delivery shall be indicated on the junction report by the words "For unloading."

A foreign car received loaded in switching service, when the original lading removed, must be handled in accordance with rule 2 or 3.

(b) An empty foreign car may be delivered to a connecting road to be loaded. Such delivery shall be indicated on the junction report by the words "For loading." The loading road must route the car in accordance with rule 2 or 3.

NOTE—Car service rules 1 to 4, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.

5.[1] Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and to insure delivery (including owners' continuous home-route card or substitute, as prescribed in rule 19), and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned, the receiving road shall be responsible for the cars, contents, and per diem after receipt of the proper data[2] for forwarding and to insure delivery and until they have been accepted by its inspector or returned to the delivering road.

CODE OF PER DIEM RULES
[Effective Feb. 21, 1917]

1. The rate for the use of freight cars shall be 45[3] cents per car per day, but may be increased for a specified period to an amount not in excess of $1.25 per car per day, which shall be paid for every calendar day, and shall be known as the per diem rate; except that where per diem is not reported to car owner within six months from the last day of the month in which it is earned the rate shall be increased 5 cents per car per day.

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[1] The date fixed for the obligatory use of the continuous home-route card, which is an absolute necessity to give flexibility to the rules, is May 1, 1917. Until the use of the continuous home-route card becomes obligatory, cars must be handled on their record rights.

[2] NOTE.—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service. Data as to owners' continuous home-route card does not apply to cars of private ownership.

[3] As announced in Circular No. 1766, dated December 6, 1916, the rate for the use of freight cars shall be 75 cents per day, effective December 15, 1916, until May 1, 1917.

2. Freight cars must be handled as prescribed in rules 1, 2, 3, and 4 of the code of car service rules of the American Railway Association.

A road diverting a foreign car shall pay to the owner thereof the sum of $5 in addition to the per diem and shall report same as a separate item on the per diem report for the month in which the car was diverted, except that where such $5 penalty charge is not reported to car owner within six months from the last day of the month in which it accrues, the penalty shall be $10.

(I) The executive committee of the American Railway Association shall appoint a commission authorized—

(a) To increase the per diem rate for a specified period in times of car shortage; but the commission shall in no case set the rate at a figure above the maximum rate named in per diem rule 1, nor give less than 30 days' notice of any change in the rates.

(b) To enforce the observance of car service rules 1, 2, 3, and 4 governing the handling of freight cars.

(II) The commission, through its duly authorized representatives, shall be empowered to examine all records of members of the per diem rules agreement, and it shall have authority to institute proceedings against member lines for violations of said rules, either on its own initiative or on complaints filed with it.

Car records of any subscriber road shall be open to the inspection of any properly accredited inspector of the commission on car service of the American Railway Association or of any subscribing railroad which may desire to check same for violations of the car service rules.

(III) It shall be the duty of the commission to conduct such investigation as may in its judgment be necessary to determine the facts.

If the commission shall find that any violation of car

service rules 1, 2, 3, or 4 has occurred, it shall enforce the penalty provided in per diem rule 3.

(IV) Any railroad may refer to the commission any case or cases of violation of these rules.

(V) In the event the case presented is not proven, the expense of the investigation shall be paid by the complainant.

Complete Text of So-Called Esch Car Service Act, 65th Cong., Sess. 1, Ch. 23, 40 Stat. 101-2.

Chap. 23.—An Act to amend an Act entitled "An act to regulate commerce," as amended, in respect to car service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the Act entitled "An Act to regulate commerce," approved February twenty-fourth, eighteen hundred and eighty-seven, as heretofore amended, is further amended by adding thereto the following:

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that the said rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

The commission shall, after hearing, on a complaint

or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Whenever the commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the commission shall have, and it is hereby given, authority either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.

The directions of the commission as to car service may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose.

The case of failure or refusal on the part of any carrier, receiver, or trustee to comply with any direction or order with respect to car service, such carrier, receiver or trustee shall be liable to penalty [102] of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Approved, May 29, 1917.

Excerpts from Testimony of Commissioner Clark in House Committee Hearings on Transportation Act of 1920.

(Hearings before the Committee on Interstate & Foreign Commerce of the House of Representatives, 66th Cong., 1st Sess., on H. R. 4378, Vol. 1, July 15-August 19, 1919, Part I, pp. 11-12, inclusive.)

"Beginning in line 1, on page 6, there is a definition of the term 'car service.' Retaining the term 'car service,' the definition of it has been expanded so as to include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, and the supply, movement, and operation of trains by any carrier subject to this act. The use and supply of cars are new terms in the definition of 'car service,' and they largely expand the jurisdiction of the act and of the commission thereunder. In the decision commonly referred to as the Paraffin case (34 I.C.C., 179) the commission, by a majority, held that it had power to require a railroad to supply itself with tank cars for the transportation of oil. That order of the commission was contested in the courts, and in 242 U. S. 208, the Supreme Court held that the commission had no power to enter that order. If this language becomes law the commission would have power to require a carrier to provide itself with locomotives, cars, and other vehicles used in the transportation of property, but, as will appear later, that power would be controlled by a rule of law stated in the statute which would protect the carrier in its constitutional rights against an order

of that kind which would impair its ability to properly serve the public.

"The other new provision in this definition of 'car service' is the extension of the jurisdiction to the supply, movement, and operation of trains. That, as will appear later, will come into play in times of emergency, car shortage, etc., and in connection with the common use of tracks or terminals, when the public interest demands such use.

"Beginning in line 22, on page 6, is a provision that the commission may—establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it.

"That is new and is necessary apparently in connection with the provision just previously discussed. It assures the owner of the locomotive, car, or other vehicle of reasonable compensation for its use by any other carrier to which it may be assigned for use.

"Beginning in line 4, on page 7, is a provision that—Whenever the commission shall be of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country it shall have the power to set aside all existing rules with regard to car service and to make just and reasonable directions with respect to car service and the interchange of equipment without regard to ownership during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, and also authority by order to require such joint or common use of terminals as in its opinion will best meet the emergency and serve the public interest, and upon such just and reasonable terms between the carriers as the commission may prescribe.

"That, again, protects the carrier owning a terminal

in the right to have just and reasonable compensation for its use. The provision in its entirety would confer upon the commission authority to do, in case of emergency in any part or all of the jurisdiction, some of the things which have been done by the Railroad Administration and which are generally conceded to be in the interest of economy in transportation and efficiency in the use of equipment at a time when the volume of transportation exceeds the capacity of the roads and facilities are short and their use in the most economical and efficient way is demanded. What I have just said goes to the use of terminals as well as to the use of equipment."

No. 917. IVERSEN ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Columbia. March 25, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is

affirmed. *Haskell Donoho, Dale C. Dillon* and *Ashley Sellers* for appellants. *Solicitor General McGrath* and *Daniel W. Knowlton* for appellees. Reported below: 63 F. Supp. 1001.